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CONVEYANCER'S NOTEBOOK

PLANNING BLIGHT BY ROAD SCHEMES

Under the Town and Country Planning Act, 1959, Part VI, provision was made to enable owner-occupiers of property affected by planning blight to serve a notice requiring the authority concerned to purchase the property forthwith at an unblighted price. Some local authorities decide to carry out road schemes without the formal approval of plans by resolution and as section 39 (1) (*f*) refers to "lands shown on plans approved by a resolution of a local highway authority" the owner may well be placed in difficulty. If he goes to sell his land the decision will appear when the purchaser makes his search and inquiries, with the result that the land may well in fact be blighted, but owing to the way in which the authority have dealt with the matter the vendor will not be able to require the authority to purchase. In the Ministry's circular, No. 48/59, the Minister draws attention to this position and suggests that where necessary local highway authorities should review their procedures so as to ensure that owner-occupiers whose property is blighted by road schemes will not be deprived of the remedy offered by the Act. Even if the highway authority proceed without formal approval by resolution the owner-occupier is not necessarily left without hope, for paragraph 54 of the circular draws attention to the power to make discretionary purchases and states: "The Minister hopes that local authorities who are asked to buy in such cases will consider them on their merits and will exercise a reasonable discretion to buy land in advance of requirements, so long as they are satisfied that the property is 'blighted' as a result of a proposal for acquisition by them and that there is genuine hardship."

Variation of Trusts Act, 1958—Practice Notes

Two practice notes relating to proceedings under the Variation of Trusts Act, 1958, have been issued. In *Re Allen's Settlement* [1959] 3 All E.R. 673, in which the applicants were asking for an extension of powers of investment to give power to invest in ordinary shares, Vaisey J. said that in future cases of that kind it would be unnecessary to file evidence by a stockbroker or other expert containing general matters of economic and financial history or argument in general terms as to the wisdom of extending powers of investment. He indicated that the same practice should be followed in applications made by charities for the purpose of obtaining wider investment powers. He further indicated that this direction was not intended to preclude the filing of expert evidence relating to matters peculiar to the particular application which an applicant was advised should be brought to the attention of the court.

The other note, dated December 9, 1959, which deals with cases where a patient is respondent to an application under section 1 (3) of the Act, is as follows:

1. As soon as an originating summons under the Act to which a patient is a respondent has been issued in the Chancery Division, the Court of Protection should be notified and an authority sought for leave to enter appearance and to apply for, or consent to the appointment of, a guardian *ad litem* for the patient in those proceedings.

2. No formal application should be issued in the Court of Protection for relief under the Act until the originating summons has been issued in the Chancery Division and evidence filed in support thereof, but the Master will in suitable cases authorise counsel to be instructed on behalf of the patient to look after the patient's interests during negotiations for an arrangement.

3. The formal application should only be entitled in the matter of the patient and the only respondent should be the patient unless the Master otherwise directs. The Master will direct whether the patient is to be served or service dispensed with, and where the Master considers that the patient should be separately represented he may request the Official Solicitor to act as solicitor for the patient on the application.

4. A copy of the originating summons (or an office copy if the arrangement is to be found in the summons itself) and office copies of the evidence in support thereof, together with the exhibits, should be lodged with the application and an affidavit filed stating how

the patient will be affected by the arrangement and whether it is considered to be for or against his benefit.

5. The Master's order will make provision for subsequent approval of amendments which may be made to the arrangement after the date of the order.

Registration of Estate Agents

The four principal professional bodies of surveyors and land agents intend to promote a Bill in Parliament for the registration and control of estate agents. At present anyone may establish himself as an estate agent without any qualifications and, if he confines himself to the business of broker and collection of rents, save with regard to one particular aspect, this is unexceptionable. The particular aspect that requires consideration is the collection of deposits. The purchase of a house is often the most important business transaction entered upon by anyone in the whole of his life and the loss of a deposit paid before a contract is entered into can amount to the gravest hardship. If there is to be registration without protection of deposits paid it is doubtful whether the public will gain very much.

Although solicitors probably do not negotiate sales and purchases on any considerable scale, it is important to see that their rights are adequately safeguarded.

What is perhaps as important as the registration of estate agents is the weeding out of unqualified surveyors. Could not the main professional bodies put their houses in order by establishing one standard of examination, even if they cannot agree on amalgamation.

Building Societies

It seems certain that there will be an overhaul of building society law, but it is to be hoped that public fears at recent disclosures will not result in restrictions that will prevent the establishment of new societies or hamper unnecessarily the traditional sphere of building society activity. The key to the existing problem appears to be almost entirely in the lack of powers of the registrar. He is quite aware of unsatisfactory practices, but often is unable to do anything about them. One society, in order to swell its paper assets, would agree to lend if more was borrowed than the borrower wished, the surplus being reinvested in the society. Premiums and redemption fees are methods of increasing the effective rates of interest. Loans at high rates on antiquated properties, which are then turned into rabbit warrens and unscrupulously exploited, enable some societies

to pay high rates and help to maintain substantial prices for properties that should come down.

One proposal is that building societies should not be permitted to provide building finance, but, with respect, this is illogical. If houses are to be provided, the builder has to be financed and we know of no evidence suggesting a high rate of defaulters among builders. In general, nothing should be done which would restrict the high standard of practice of the leading societies. Improper practices of the type indicated above could be controlled without undue difficulty.

Unbalanced lending—lending too much to one borrower or group of borrowers—is more difficult to control but the registrar has already taken some steps in that direction. Instead of dealing with the matter in regulations that can easily be traced it has been done in a rather hole in the corner manner which makes it so difficult for practitioners to be certain that they know what the latest position is. In fact, there is a note on the point in [1959] 12 C.L. 54. The registrar, exercising his powers under the Building Societies Act, 1894, s. 2, has made an alteration in the form of the annual account and statement which has to be lodged by building societies. Part VI of the form requires particulars where the society lends more than £25,000 to any one borrower or group of borrowers.

Very little guidance is given on the question, what constitutes a group of borrowers? There is a note that a group shall be taken to include companies and subsidiary companies under common control and borrowers acting as nominees for more than one nominator. Quite clearly, a parent company and its subsidiaries constitute a group so that where a parent company owns directly or indirectly 50 per cent. of the capital of another company that other company is a subsidiary and together they form a group or part of a group. It is much more difficult to decide what is meant by " common control " but it is conceived that where the controlling person or company has power to nominate more than half the board, that amounts to control: see the Companies Act, 1948, s. 154.

Where, however, two or more persons control two or more companies, it is conceived that common control does not exist. For there to be common control the two persons would either have to have a joint holding or there would have to be a binding agreement with regard to control. In practice, therefore, the alteration in the form still leaves a very serious loop-hole. Companies may be associated companies as that expression is ordinarily understood without their constituting a group for the purposes of the

form. There is no group if the control does not remain with one person or company although that person or company may in fact, though not in law, have control, as when a person holds 49 per cent. of the shares and his infant son 2 per cent.

The House Purchase and Housing Act, 1959, points the way in which control could be exercised. By section 1 of the Act the Treasury may prescribe requirements as to assets and liabilities, liquid funds, reserves and other matters. There is no reason why the Treasury should not be empowered to prescribe requirements for all building societies whether they wish to have trustee status or not. If the building societies between them could find some way of guaranteeing deposits in all building societies, they could all be raised to trustees status. Incidentally, a publication intituled *Hallmark* (Franey & Co., Ltd., price 7s. 6d.) lists all the building societies with trustee status as at September 30. It is to be revised and published in April of each year.

The New Scale of Costs

Protracted negotiations between the Law Society and the Lord Chancellor's Office have at long last produced the Rules of the Supreme Court (No. 3), 1959 (S.I. 1959, No. 1958). An entirely new Appendix 2 replaces the old Appendix N. There are still over 100 items and the emphasis still seems to be on quantity rather than quality, though not to as great an extent as formerly. There is little doubt that the Law Society have put forward their views forcefully and tenaciously, but the result appears to be a compromise. Solicitors are still to be treated as rather suspicious characters in the High Court. A long article on the new rules appears in the Law Society's *Gazette* for December, at p. 837.

Assuming the new appendix is reasonably applied, solicitors will be reasonably remunerated for High Court litigation for the first time for many years and there may be a tendency to cut down some of the wasteful work that has gone on in solicitors' offices for so long merely for the purpose of ensuring that some item or other was not disallowed on taxation. But the more fundamental question of an efficient and economic High Court procedure is virtually untouched. If a mortgagee wishes to obtain possession and sell his security, he is well advised to proceed in the county court. Applications for new leases under the Landlord and Tenant Act, 1954, seem to be far simpler and more expeditious in the county court than in the High Court. It is the post and telephone that have a lot to do with it: in the county court nearly everything

can be done by post—even a taxation, sometimes—and interlocutory applications tend to disappear. In the High Court recently a claim for possession took nine years to come up for a hearing; there was no answer apparently, but the court evidently thought the defendant had not had long enough and gave him a further six weeks. The courts may frown on owners resorting to self help, but, if an owner, wishing to obtain his own property, asks his solicitor whether he can be certain of getting it on a particular date, the solicitor can hardly in truth answer "yes."

Of perhaps rather more direct interest to conveyancers are the new increased scale fees on sales where the consideration is under £1,000. The new fees came into force on January 1, and apply to all cases where instructions are received on or after that date. The scales apply to sales, purchases and mortgages and are prescribed by the Solicitors' Remuneration Order, 1959 (S.I. 1959, No. 2027) and the Solicitors' Remuneration (Registered Land) Order, 1959 (S.I. 1959, No. 2028). Even now the scales are on the low side, for a minimum scale fee in the case of registered land of £5 15s. 6d. can hardly leave a net profit. It is unfortunate that the authorities would not agree to a minimum of ten guineas on each scale. However, there is no doubt that the Council of the Law Society have had some considerable success. In the case of unregistered land, the minimum has gone up from £4 10s. to £9 9s. Not merely have the minima been increased but the scale starts to move at £100, which is another advantage. The scales are as follows:

Unregistered land

	£	s.	d.
Under £100	9	9	0
£100 or over but not exceeding £150 ...	10	10	0
Over £150 „ „ £200 ...	11	11	0
Over £200 „ „ £300 ...	12	12	0
Over £300 „ „ £350 ...	12	15	0
Over £350 „ „ £400 ...	13	10	0
Over £400 „ „ £450 ...	14	5	0
Over £450 „ „ £500 ...	15	0	0
Over £500 „ „ £550 ...	15	15	0
Over £550 „ „ £600 ...	16	10	0
Over £600 „ „ £650 ...	17	5	0
Over £650 „ „ £700 ...	18	0	0
Over £700 „ „ £750 ...	18	15	0
Over £750 „ „ £800 ...	19	10	0
Over £800 „ „ £850 ...	20	5	0
Over £850 „ „ £900 ...	21	0	0
Over £900 „ „ £950 ...	21	15	0
Over £950 „ „ £1,000 ...	22	10	0

Registered land

	£	s.	d.
Under £100	5	15	6
£100 or over but not exceeding £150 ...	6	6	0
Over £150 „ „ £200 ...	7	7	0
Over £200 „ „ £300 ...	8	8	0
Over £300 „ „ £350 ...	8	10	0
Over £350 „ „ £400 ...	9	0	0
Over £400 „ „ £450 ...	9	10	0
Over £450 „ „ £500 ...	10	0	0
Over £500 „ „ £550 ...	10	10	0
Over £550 „ „ £600 ...	11	0	0
Over £600 „ „ £650 ...	11	10	0
Over £650 „ „ £700 ...	12	0	0
Over £700 „ „ £750 ...	12	10	0
Over £750 „ „ £800 ...	13	0	0
Over £800 „ „ £850 ...	13	10	0
Over £850 „ „ £900 ...	14	0	0
Over £900 „ „ £950 ...	14	10	0
Over £950 „ „ £1,000 ...	15	0	0

Even the humble commissioner's fees have not been overlooked. The fee for an oath has been increased as from January 1 to 5s. and the fee for an exhibit to 2s. 6d.: The Commissions for Oaths (Fees) Order, 1959 (S.I. 1959, No. 2255).

RENTCHARGES IN REGISTERED CONVEYANCING—I

By Theodore B. F. Ruoff, Solicitor

INTRODUCTION

For the past thirty years and more the Land Registry has been registering the title to rentcharges and the title to corporeal land which is subject to rentcharges. These registrations have not been confined to areas such as London and Bristol, where, apart from a few ancient charitable charges, most rentcharges are collected for all time from a definite parcel of land, second rentcharges are virtually unknown, and informal apportionments and exonerations, so far as they exist, are easily comprehensible. Rentcharges in those areas present none of the complexities and problems which arise in and around Manchester and other northern cities by reason of the relative antiquity of the local chief rent system, the existence, side by side, of overriding and improved rentcharges, and the complicated tangle of numerous and recurring apportionments and exonerations which, being almost invariably informal, never can and never do relieve the landowner of his liability towards the rentowner and so do not free his solicitor from the responsibility of informing himself about them. Ever since it was announced that the corporations of Manchester and Salford [1] had passed resolutions asking for compulsory registration of title to be applied to their areas, an increasing number of practitioners in those areas have made voluntary applications for registration both of land and of rentcharges, so that the examiners of title in the Land Registry are getting valuable additional experience, not only of common types of business dealings in rentcharges, but also of some of the more obscure types of transaction. This experience cannot fail to benefit both the Registry and the legal profession when compulsory registration begins, for there is no subject which receives a more meagre and fragmentary treatment in the Land Registration Acts and Rules than that of rentcharges. Yet because the lacunae in the registration law can be filled in by means of administrative action, the registration system and the chief rent system are ideally suited for symbiosis, for with its innate flexibility the register can present a clear and succinct picture of the landowner's liability under rentcharges in a way that is impossible

[1] To which must now be added Blackburn.

in an abstract of title or in a particular title deed or set of deeds. It is the writer's aim to show how the Land Registry handles all aspects of the rentcharge system and how the practitioner may do his work easily and successfully despite a lack of guidance from the Land Registration Acts and Rules. Some precedent forms will be provided.

It is proposed to deal with the subject under the following headings:

(1) Rentcharges capable of being registered.
(2) Applications for first registration of rentcharges.
(3) The process of completion by registration and the results.
(4) Applications for first registration of corporeal land subject to rentcharges.
(5) The completion thereof by registration and the results.
(6) The creation of rentcharges out of registered land and transfers of land subject to rentcharges, including apportionments.
(7) The transfer, redemption and extinguishment of registered rentcharges, and like matters.

1. REGISTRABLE RENTCHARGES

Definition

In the Land Registration Act the definition of "land" includes a rentcharge [2] which, in turn, is defined in the following terms:

> "Rent" includes a rent service or a rentcharge, or other rent, toll, duty, royalty, or annual or periodical payment, in money or money's worth, issuing out of or charged upon land, but does not include mortgage interest.[3]

It is readily apparent that most of the items mentioned in this list are not capable of substantive registration under the Land Registration Acts and hence are not germane to the subject under discussion. Thus a rent service is a rent reserved to a reversioner and is an incident of tenure [4]; it is not a rentcharge and the title to it cannot be registered at the Land Registry. A rent seck (if there is still such a thing) is a periodical sum issuing out of land, but the payment of it is not secured by a right of distress [5] and, consequently, it is not a rentcharge properly so-called and is not capable of registration. An annuity payable for the redemption of tithe

[2] Land Registration Act, 1925, s. 3 (viii).
[3] *Ibid.* s. 3 (xxv).
[4] Co.Litt. 87b, 142b.
[5] *Weston* v. *Bowes* (1742) 9 Mod.Rep. 309, 310; *Re Lord Gerard and Beecham's Contract* [1894] 3 Ch. 295, C.A., at p. 311.

rentcharge is not a charge upon land; it is a charge in respect of land. In registered conveyancing it has been constituted an overriding interest [6] and the title to it clearly cannot be registered. Rents of assize, quit-rents, crown rents, and similar manorial incidents have all now ceased to exist,[7] but in any event they were overriding interests [8] and not registrable. On the other hand a fee farm rent, which is usually understood to mean a perpetual rentcharge being at least a quarter of the annual value of the freehold land upon which it is charged,[9] is a true rentcharge,[10] and the title to it may be registered.

RENTCHARGES CAPABLE OF BEING REGISTERED

Estates that are capable of subsisting as legal estates are the only interests in land in respect of which a proprietor can now be registered,[11] so that substantive registration is only possible in the cases of rentcharges in possession, created by the owner of a legal estate, and issuing out of or charged on land, which are either perpetual or have been created for a term of years absolute.[12] When a rentcharge subsists as a legal estate another rentcharge may be created out of it and this, too, is capable of subsisting as a legal estate [13] and may be the subject of substantive registration. By "substantive registration" is meant the registration of a rentowner as the proprietor, under a separate title, of the title to a rentcharge, in contradistinction to the mere noting of the rentcharge as an incumbrance upon the title of the landowner.

It has been stated [14] that a rentcharge for a term of less than twenty-one years is not registrable. This view appears to draw a false analogy with leasehold land,[15] and it is entirely untenable. It is also unreasonable because whereas it is possible for a prospective purchaser to go to the site and discover the presence of the tenant under a short-term occupation lease, thus rendering it unnecessary for the tenant's title to be protected by registration, no one normally expects to find a rentowner in physical possession of the land charged. In short, a terminable rentcharge for any term, no

[6] Defined, Land Registration Act, 1925, s. 3 (xvi). See the Tithe Act, 1936, ss. 3, 13 (11); the Land Registration Act, 1925, s. 70 (1) (*e*).
[7] Law of Property Act, 1922, s. 138, s. 128 (2), proviso, s. 140; Postponement of Enactments (Miscellaneous Provisions) Act, 1939, s. 3; Postponement of Enactments (Miscellaneous Provisions) Act, 1939 (Manorial Incidents Extinguishment) Order, 1949.
[8] Land Registration Act, 1925, s. 70 (1) (*b*).
[9] Co.Litt. 143b.
[10] Law of Property Act, 1925, s. 205 (1) (xxiii).
[11] Land Registration Act, 1925, s. 2 (1).
[12] Law of Property Act, 1925, s. 1 (2) (*b*).
[13] *Ibid.* s. 122 (1).
[14] Brickdale and Stewart-Wallace's *Land Registration Act, 1925* (4th ed.), p. 345.
[15] Land Registration Act, 1925, ss. 8 (1), 22 (2), 70 (1) (*k*).

matter how short, is capable of being registered if it issues out of freehold land. If it issues out of leasehold land it can be registered if it is a true rentcharge. In such a case the applicant must establish that the lease was properly granted and that the rentcharge is effectually supported by a power of distress.[16]

Again if, as sometimes happens, a building lease is granted for a long term of years at a rent and, in order to secure that buildings of sufficient value are erected and maintained on the demised premises the lessee, who owns adjoining freehold land, creates out of it, in favour of his lessor, a terminable yearly rentcharge for the duration of the lease, and this rentcharge is supported by a power of distress and, in default of sufficient distress, by an absolute power of re-entry, the rentcharge is susceptive of substantive registration. In such a case there may be a proviso that if and when the lessee completes the erection of buildings of the clear yearly value of (say) double the reserved rent the lessor will, at the request of the lessee, release the rentcharge. This does not prevent registration of the rentcharge [17] although, of course, the register must contain a note as to its determinability.

Clearly a rentcharge for life is not capable of being the subject of substantive registration, but it may be noted as a general equitable charge [18] against the registered title of the land charged.[19]

To sum up, the following rentcharges may be the subject of substantive registration:

(i) A perpetual legal rentcharge.
(ii) A terminable legal rentcharge issuing out of freehold land for any term.
(iii) A terminable legal rentcharge issuing out of leasehold land for any term less than that of the lease, provided it is a true rentcharge.

Rentcharges (or annuities) which are not capable of being registered are not overriding interests and they must therefore be noted as incumbrances against the registered title out of which they issue. This statement does not apply to minor interests arising under a settlement.[20]

Terminology

With a view to attaining clarity and simplicity, as well as economy in the use of words, the Land Registry has adopted certain

[16] *Re Fraser, Lowther* v. *Fraser* [1904] 1 Ch. 111, affirmed [1904] 1 Ch. 726.
[17] See definition of "term of years absolute" in the Law of Property Act, 1925, s. 205 (1) (xxvii).
[18] See the Land Charges Act, 1925, ss. 4, 10 (1), class C (iii), class E.
[19] Land Registration Act, 1925, s. 49 (1) (*c*).
[20] As to which, see *ibid.* s. 86 (2).

standardised words and phrases for use on the register of title and these will be used hereafter. Thus, in order to distinguish them unmistakably from freehold and leasehold ground rents, being rents incident to a reversion, all true rentcharges are always referred to on the register as "*rentcharges*" regardless of the way in which they may be described in the unregistered title deeds as, for example, chief rents (a curiously inept phrase), quit rents, second rents, improved rents, indemnified rents, or simply rents. These remarks do not apply to a *fee farm rent* which is always so described. The deed creating a rentcharge is always described on the register as a "*conveyance*" even though in the unregistered deeds it may be called a feoffment, a bargain and sale, or a lease and release. In the case of a lease and release the date of the release alone will be quoted on the register. These remarks cannot in the nature of things apply to a *deed of grant*, which is always so described on the register.

In regard to remedies, a *power of distress*[21] is so described whether the title deeds refer to it as a power to distrain, a right to distrain, or a power or right of distrainer, or of distress. A power to enter into the charged land and take the income of it,[22] sometimes referred to as a power of entry for perception of rents and profits, is described on the register simply as "*a power of entry for perception.*" On the other hand, when a rentowner is given a power, upon breach of condition, to re-enter upon the land of the terre tenant so as to determine his estate by forfeiture,[23] this power is described on the register as "*an absolute power of re-entry.*" When a purchaser of land is authorised to withhold payment of a second rentcharge, to which he is subject, in the event of his vendor failing, under a covenant by way of indemnity, to pay a prior (overriding) rentcharge, his right is described as "*a power of retainer*" whether in the unregistered title deeds it is called a power or a right to retain, or of retainer, or of retention, or otherwise. In regard to apportionments of a rentcharge, a legal apportionment in which the rentowner concurs (or which is made by the Minister of Agriculture, Fisheries and Food[24]), is referred to as a *formal apportionment*: an equitable agreement made between a vendor and his purchaser without the concurrence of the rentowner is referred to as an *informal apportionment.*

[21] Law of Property Act, 1925, s. 121 (2).
[22] *Ibid.* s. 121 (3).
[23] See *Doe* d. *Biass* v. *Horsley* (1834) 1 A. & E. 766, for the distinction between the two powers. The case of *Peirson* v. *Sorrel* (1682) there cited will be found in 2 Show. 185 or 2 Show. (2nd ed.), 198.
[24] Law of Property Act, 1925, s. 191 (7).

2. APPLICATION FOR FIRST REGISTRATION OF A RENTCHARGE

Voluntary Registration

The first fact to note about the title to a rentcharge is that it is never compulsorily registrable merely because the land out of which it issues lies within a compulsory area. The provision which empowers Her Majesty to make an order in Council declaring registration of title to be compulsory on sale in a specified area contains a proviso "that nothing in this Act or in any such Order shall render compulsory the registration of the title to an incorporeal hereditament. . . ."[25] However, the title to be a rentcharge is always voluntarily registrable.

Dispositionary Rentcharges

Nevertheless, the general principle that all dispositions of land of which the title is already registered, no matter where that land may happen to be situated, must be completed by registration in order that the grantee may obtain[26] and may be able to pass on[27] the legal estate, applies to the creation of a rentcharge issuing out of registered land.[28] Consequently it is always necessary for the title to a rentcharge to be registered if the grantor is the registered proprietor of the land out of which it issues. This question will be more fully considered hereafter[29] but it may here be noticed that when the consideration for the creation of a rentcharge is wholly or partly the transfer of registered land, the title to the rentcharge will automatically be registered on application being made to register the transfer so that no application for first registration is needed. On the other hand, it is necessary for the rentowner to make an application for first registration when a rentcharge is created out of registered land by a deed of grant independently of any sale.

Kinds of Title

Under the Land Registration Acts seven different classes of title may be granted to an applicant for first registration, that being the process of bringing unregistered property under the operation of the Acts so that thenceforth it becomes "registered land." Of these seven classes, only three can possibly apply to a

[25] Land Registration Act, 1925, s. 120 (1), proviso.
[26] *Ibid.* s. 19 (2).
[27] *Cf. British Maritime Trust* v. *Upsons, Ltd.* [1931] W.N. 7.
[28] Land Registration Act, 1925, ss. 18 (1) (*b*), (*d*), 21 (1) (*b*), (*c*), 18 (5), 21 (5).
[29] See a later article.

rentcharge. These are, an absolute title, a qualified title and, occasionally, a possessory title. Good leasehold title, or the other classes of title to leasehold land, have no application to rentcharges, not even terminable rentcharges.

Absolute Title

In regard to an absolute title it is provided that when the registered land is a freehold estate, the registration of any person as a first proprietor of it with an absolute title vests in him an estate in fee simple in possession in the land, together with all rights, privileges, and appurtenances belonging or appurtenant thereto, subject to the following rights and interests, that is to say:

(a) the incumbrances, and other entries appearing on the register of title; and

(b) unless the contrary is expressed on the register, the overriding interests (if any) which affect the registered land [30]; and

(c) if the first proprietor is not entitled for his own benefit to the registered land (as between himself and the persons entitled to minor interests [31]), to those interests if the first proprietor has notice of them;

but free from all other estates and interests whatsoever, including estates and interests of Her Majesty.[32]

An application for first registration of a rentcharge must be made in a similar way to an application for first registration of a freehold estate in land, subject only to such modifications as need to be made to take account of the differences in the natures of the properties. When the application is received in the Registry it will be dealt with, subject to necessary modifications, in the same way as any other application.[33]

In general, it may be said that an absolute title to a rentcharge may be granted:

(i) On an original grant, effectually made, if the title of the grantor to create the rentcharge is satisfactorily deduced for the statutory period of thirty years, commencing with a good root of title.[34]

(ii) Subsequently to the original grant of the rentcharge, if the grant is an old one and it contains (or there is separately

[30] Defined. Land Registration Act, 1925, s. 3 (xvi).
[31] *Ibid.* s. 3 (xv).
[32] *Ibid.* s. 5.
[33] Land Registration Rules, 1925, r. 50.
[34] Law of Property Act, 1925, s. 44 (1). *Cf. Re Earnshaw-Wall* [1894] 3 Ch.D. 156, 158.

deduced) evidence which, on the face of it, proves the power of the grantor to create the rentcharge, and the subsequent title to the rentcharge itself is also deduced for the statutory period commencing with a good root of title.[35]

These remarks apply to terminable as well as to perpetual rentcharges, but when a terminable rentcharge issues out of leasehold land instead of out of freehold land, the power of the lessor to grant the lease and its valid creation must be established, and the status of the rentcharge as such,[36] supported by a power of distress, must be strictly proved. The fact that an absolute title is granted in respect of a rentcharge issuing out of leasehold land does not, of course, prevent the lease from being determined by forfeiture, and although such an occurrence will result in the disappearance of the security, it cannot lead to a claim against the Land Registry insurance fund.[37]

It should be noted that no appeal to the court lies from a refusal of the Chief Land Registrar to grant an absolute title.[38]

Qualified Title

When an absolute title is sought, but on the examination of the title it appears to the Chief Land Registrar that the title can be established only for a limited period, or only subject to certain reservations, he may, on the application of the applicant for first registration, by an entry made in the register, except from the effect of registration:

(i) Any estate, right, or interest arising before a specified date, or,

(ii) Any estate, right or interest arising under a specified instrument, or otherwise particularly described in the register.

A title registered subject to any such excepted estate, right, or interest is known as a qualified title. The registration of a person as first proprietor with this class of title has the same effect as registration with an absolute title save that the enforcement of the excepted estate, right or interest is not affected or prejudiced by the registration.[39] An applicant cannot ask, in the first instance, for a qualified title. Furthermore, the Chief Land Registrar cannot grant such a title unless an applicant, who has been refused the grant of an absolute title, requests the grant of it.[40]

[35] *Ibid.*
[36] See *Re Fraser, Lowther* v. *Fraser* [1904] 1 Ch. 111, affirmed [1904] 1 Ch. 726; *cf. Lewis* v. *Baker* [1905] 1 Ch. 46.
[37] *Cf.* the Land Registration Act, 1925, s. 83.
[38] *Dennis* v. *Malcolm* [1934] Ch. 244.
[39] Land Registration Act, 1925, s. 7.
[40] *Ibid.*

In general, a qualified title to a rentcharge may be granted by the Chief Land Registrar if, after his refusal of an absolute title, the applicant expresssly asks for it, in any case in which the original grantor of the rentcharge had no power to grant it, or his power to do so has not been proved. The terms of the qualification in such a case, may be:

"Qualification: there are excepted from this registration all estates rights and interests affecting or in derogation of the title of [*the grantor*] to grant the registered rentcharge."

Possessory Title

Only rarely will a possessory title be granted in respect of a rentcharge. In the case of registered land which is a freehold estate, the registration of any person as first proprietor of it with a possessory title does not affect or prejudice the enforcement of any estate, right or interest adverse to, or in derogation of, the title of the first proprietor, and subsisting or capable of arising at the time of his registration; but, in other respects, it has the same effect as registration of a person with an absolute title.[41]

In the case of corporeal freehold land a possessory title is often granted because the title deduced to the Registry is weak or defective, not simply because the applicant is a squatter or is for other reasons in occupation of the land. Such a title may, without difficulty, be converted to an absolute title after the lapse of fifteen years.[42] In regard to a rentcharge, however, a possessory title will not be granted in respect of a weak or defective title in the way which is customary in the case of corporeal land because the weakness or defect is not usually of such a nature as to be capable of being cured merely by the passage of a short period of time. Thus a possessory title is appropriate for a rentcharge only where there is evidence that it was originally validly created and:

(a) *either*, it has been paid to the wrong person for the statutory period, which runs from the last actual payment, not from the last date on which payment should have been made,[43]

(b) *or*, possibly, that it has been paid to the right person, but the deeds have been lost.

When a rentcharge is granted out of land registered with a possessory title, the title to it cannot be registered with an absolute title unless and until the title of the charged land is first converted to an absolute title.[44]

[41] *Ibid.* s. 6.
[42] *Ibid.* s. 77 (3) (*b*)
[43] Limitation Act, 1939, ss. 4, 31 (1), (6).
[44] See the Land Registration Act, 1925, s. 77.

Form of Application

The Land Registration Rules provide that "application for registration of . . . rents . . . shall be made according to the rules above prescribed, and shall be proceeded with in the same manner, subject only to such modifications as the nature of the case may require and the Registrar may approve. Provided that where a rentcharge is created by an instrument, that instrument shall be referred to in the register."[45] "The rules above prescribed" are the general rules governing the first registration of title to freehold land, and these rules are adapted as necessary by the Chief Land Registrar so as to enable applications for registration of rentcharges to proceed with the same ease as applications for registration of corporeal land.

The following printed forms of application for first registration have been specially devised by the Chief Land Registrar in pursuance of the powers vested in him.[46] They may be obtained from any branch of H.M. Stationery Office[47] or through any bookseller, and should be used in the circumstances to which they are applicable:

Form 1F: This form should be used for an application made on behalf of an original grantee of a rentcharge (other than a company or corporation) or a purchaser of a rentcharge (other than a company or corporation) when he applies for registration immediately after the grant or sale. It applies not only to an absolute owner, but also to a tenant for life, trustees for sale, personal representatives, or to other non-corporate estate owners.

Form 1H: This form should be used in any application on behalf of a company or corporation which is the original grantee, or a purchaser of a rentcharge, immediately after the grant or sale.

Form 1G: This form should be used for an application made on behalf of a person or persons (not a company or corporation) when there has been no recent sale or grant of the rentcharge which is sought to be registered. The applicant is required to make the statutory declaration printed within the form,[48] so as to bring the relevant facts as to title up to date.

Form 1G (Co): This form applies to the identical circumstance described *sub nom.* "Form 1G" except that the applicant is a company or corporation.

[45] Land Registration Rules, 1925, r. 50.
[46] Land Registration Rules, 1925, r. 75; *cf.* rr. 74, 78.
[47] *e.g.*, York House, Kingsway, London, W.C.2; 39 King Street, Manchester, 2; 2 Edmund Street, Birmingham, 3; Tower Lane, Bristol, 1.
[48] Land Registration Act, 1925, s. 14.

Each of the above forms may be used whether the rentcharge is perpetual or terminable. If the conveyance to the applicant conveys a number of rentcharges, it is not usually necessary to use a separate application form for each rentcharge, as it will be possible to adapt the appropriate form to refer to all the rentcharges. But where corporeal land is conveyed and rentcharges are also conveyed or created by a single deed and the applicant wishes to register his title to the rentcharges as well as his title to the land, it is essential that he should make a *separate* application in one of the above forms in respect of the rentcharges.

None of the above forms need be completed by the applicant when a rentcharge is created as the consideration (or as part of the consideration) for a transfer of registered land,[49] for they are solely applicable to an application for first registration of a rentcharge which is:

(i) granted out of registered land independently of a purchase transaction,[50] or,

(ii) reserved out of unregistered land on a conveyance thereof, or,

(iii) created out of unregistered land by a deed of grant.

Documents in Support of Application

The appropriate application form described above should be lodged at the Registry by post with the following documents:

(1) All original deeds and documents relating to the title which the applicant has in his possession or can oblige the holder to produce, including opinions of counsel, abstracts of title, contracts for or conditions of sale, requisitions, replies, official certificates of search in the Land Charges Registry and other like documents. Usually the Chief Land Registrar does not require documents to be produced which affect also other property, or for the production of which a fee has to be paid.

(2) In order that satisfactory entries for the register may be framed, and for the convenience of all persons concerned, the registered proprietor and the Land Registry should each possess detailed particulars of the deed which created the rentcharge, of any deed which formally apportioned it, and of all deeds creating prior rentcharges. When the original of any such deed is in the possession of the applicant and is lodged with the application, a certified copy of it for filing in the registry should also be supplied. When the applicant

[49] Land Registration Rules, 1925, r. 107.
[50] This subject will be dealt with in a later article.

holds only an abstract or copy of this deed, an additional abstract or copy of it should be supplied for filing. All abstracts or copies of deeds must be marked by a practising solicitor as having been examined, either with the original deeds, or with an examined abstract or verified copy of them.

(3) A copy, certified by the applicant's solicitor—not his clerk—to be a true copy, of the conveyance or grant in favour of the applicant, including a copy of any plan thereon. A carbon copy of the engrossment of the deed suffices provided it is a clear one.

(4) Sufficient particulars by plan, or otherwise (if not contained in the conveyance or grant to the applicant), to enable the Land Registry officials to identify on the ordnance map the land out of which the rentcharge issues.[51]

(5) On an application relating to an original grant of a rentcharge (independently of any sale of land), if the grantor's title is already registered, the land certificate of his title must either be lodged with the application or be deposited at the registry. When, however, registered land is sold in consideration, or partly in consideration, of a rentcharge, an application for first registration is not required.[52]

(6) A list in triplicate of all documents delivered. The first copy of this list is used immediately to acknowledge receipt of the documents; the second is sent to the applicant with the completed application and indicates the documents retained by the registry; the third is filed.

(7) A cheque for the fees.[53]

Description of Rentcharge

In the application for first registration the rentcharge should be described as "the perpetual (*or* terminable) yearly rentcharge of £—— charged upon and issuing out of freehold land" which is then shortly described. If, as happens on rare occasions, the rentcharge is created out of leasehold land,[54] it should be described as "the terminable yearly rentcharge of £—— charged upon and issuing out of leasehold land [there shortly described] for the residue of a term of —— years from —— created by a lease dated —— and made between ——." It is absolutely essential that a second or subsequent rentcharge should be described as such even though it is an indemnified second rentcharge, that is to say, a

[51] See further the sub-heading, "Identification of land: survey."
[52] This subject will be dealt with in a later article.
[53] See further *sub nom.* "Fees."
[54] See p. 15, *ante*.

second rentcharge where the overriding rentcharge is charged by way of exoneration on other land, and the owner of the second rentcharge is given no power of retention in the event of non-payment of the overriding rentcharge. It would, of course, be seriously misleading if an applicant for registration were to describe a second rentcharge as a first rentcharge although, in the case of an indemnified second rentcharge, it is unlikely that any monetary loss would ensue from such a misdescription. As will be seen hereafter, a full disclosure of overriding rentcharges must be made.[55]

Registration of Part of Rentcharge

Parts of a rentcharge may be sold without the consent of the terre tenant so as to leave a power of distress incident to each portion and, when this has been done, one rentowner may exercise his power of distress in respect of his part of the rentcharge,[56] although it seems he may lose his powers of entry, because they are indivisible.[57] Moreover, even the power of distress cannot be exercised (in the absence of a formal apportionment) over a particular portion of the charged land in order to recover part of the rentcharge and over another portion of the charged land in order to recover another part of the rentcharge.[58] Despite these difficulties the Land Registry is sometimes asked to register the title to part of a rentcharge, usually when the rentcharge has been formally apportioned. The form of application should be worded to suit the facts and the deed of apportionment must be lodged with a certified copy of it for filing.[59] But if in an application to register a rentcharge it is stated merely that the interest is an apportioned part of the original rentcharge and that no further evidence of apportionment can be obtained, the best that can be done in the registry is to register the rentcharge in the normal way as if it were an entire rentcharge and to add a note in the property register that it is not known whether the apportionment was formal or informal.

Solicitor's Certificate as to Title

Each of the forms of application for first registration described above provides for a certificate to be given by the applicant's solicitor relating to the title. He is required amongst other matters to certify [60] that he acted for the applicant in the transaction which

[55] See p. 21, *post*.
[56] *Colborne* v. *Wright* (1678) 2 Lev. 239; *Rivis* v. *Watson* (1839) 5 M. & W. 255, at p. 266.
[57] *Dumpor's Case* (1603) 4 Co.Rep. 119b (vol. 2, p. 558).
[58] *Owens* v. *Wynne and Jones* (1855) 4 E. & B. 579.
[59] For a typical entry of a part of a rentcharge on the register, see a later article.
[60] Land Registration Act, 1925, s. 14 (1) (2); see also the Land Registration Rules, 1925, r. 29.

led to the application being made and that he investigated the title in the usual way; that he believes, as a result, that the assurance validly conveyed to the applicant the estate or interest which it purported to convey, free from any adverse rights or incumbrances which are not shown by it. He must state that he is not aware of any question or doubt affecting the title to the rentcharge, or of any matter or thing whereby the title is or may be impeached, affected, or called in question in any manner whatsoever. He is required to set out a list of existing incumbrances in a schedule. "Incumbrance" is not here used in the limited sense of a mortgage or charge on land securing money [61] and, in any event, will embrace all prior or overriding rentcharges, including second rentcharges against which indemnities have been given. It is absolutely essential that all earlier rentcharges should be disclosed, whether or not the applicant for registration has the benefit of an indemnity against them, and whenever it appears to the Chief Land Registrar that a prior rentcharge exists, he will enter notice of the fact on the property register of the title relating to the second rentcharge. In addition, the entry will give short particulars of any deed containing an indemnity against payment of it.[62] If, as a result of a faulty deduction of title by an applicant's solicitor, an overriding rentcharge is not disclosed on the first registration of a second rentcharge, it obviously will not appear on the register unless the registry happens to be aware of its existence from its own sources of information but, even so, if, in the result, some person should suffer loss, compensation out of the Land Registry insurance fund would be payable on the ground that a mistake had been made in the register.[63] Nevertheless, it is necessary to bear in mind that compensation is payable in the case of an actual loss but not in the case of a contemplated loss,[64] and that the owner of the overriding rentcharge will not be indemnified for the omission if—as is likely—he is receiving his rentcharge out of land other than that out of which the second rentcharge issues. If this were not so it is difficult to see how the applicant for registration could fail to be aware of the overriding rentcharge. Therefore, if the omission were to come to light, the register of the rentowner would normally be rectified by the entry on it of notice of the liability to the overriding rentcharge but, unless he could show that the value of his property was thereby depreciated, it is difficult to see how he could claim that he had otherwise suffered loss.

[61] *Cf.* Law of Property Act, 1925, s. 205 (1) (xii).
[62] This will be exemplified in model entries for the register which will appear in a later article.
[63] Land Registration Act, 1925, s. 83 (2).
[64] *Ibid.* s. 83 (1), (2), (6).

It will be apparent that the certificate as to title embodied in each application form is an authoritative document, the giving of which should not be undertaken lightheartedly as a formality, and that signing of it must be preceded by a thorough examination of title in accordance with customary conveyancing practice. It must be signed by a solicitor, never by an unqualified clerk.[65] For the same reason, a " signature " by means of a rubber stamp is not acceptable.[66] If a material fact were to be misstated through carelessness and this led to an error or omission in the register, it is possible that, on discovery of the mistake, the register would be rectified against the registered proprietor despite his being in possession of the land, especially if it appeared that the error in the certificate of title caused or substantially contributed to the error or omission.[67] In any event no indemnity is payable when an applicant has himself caused or substantially contributed to a loss by his fraud.[68]

Identification of Land: Survey

The Rules provide that " on the registration of a rent . . . the applicant shall leave in the registry, with the application, a plan of the lands out of which they are issuing, so far as they can be conveniently identified and described, or such other information as may be necessary for identifying such lands, so far as practicable, on the ordnance map: provided that if the applicant leaves in the registry a reference to the general map showing with sufficient accuracy the land affected by his application, it shall not be necessary for him to leave, deposit, or furnish any plan." [69] Often the needed evidence of identity is provided by a plan drawn on the deed creating the rentcharge, but when, in a built-up area, a rentcharge issues out of old-established dwelling-houses, it is usually possible to identify the land by a verbal description by street names and numbers. If a rentcharge is created out of land of which the title is already registered the description of the land must also include a reference to the title number.[69a] In the north of England it frequently happens that the land out of which a rentcharge issues includes the soil of a moiety of adjoining roads and passages and, if a plan is employed for better description, this moiety is frequently shown thereon. When, however, the Land Registry prepares an

[65] See the official Note to Form 1 in the Schedule to the Land Registration Rules, 1925.
[66] *Cf. Goodman* v. *J. Eban, Ltd.* [1954] 1 Q.B. 550.
[67] Land Registration Act, 1925, s. 82 (3) (*a*).
[68] *Ibid.* s. 83 (5) (*a*).
[69] Land Registration Rules, 1925, r. 52.
[69a] *Ibid.* r. 113 (1).

official filed plan showing the charged land, it will omit therefrom any such roads or passageways which have been adopted by the local authority although, when requisite, vaults or cellars under roadways will be shown. This customary procedure does not diminish the value of the rentowner's security because it is obvious, on the one hand, that he cannot pursue remedies such as distress or entry for perception [69b] in respect of adopted streets and passages and, on the other hand, that the *medium filum* presumption applies to registered property.[70]

Unfortunately, some plans used in unregistered conveyancing are so inaccurate and so lacking in dimensions or detail fixing the location, as well as the extent, of the property, that they do not enable it to be identified with precision. Again, many of the plans on deeds creating rentcharges were prepared before there was any development of the site, so that the process of identification is sometimes an extremely difficult one. Yet again, it often happens that a site has been developed since the date when the latest edition of the ordnance survey map was prepared or revised. In cases such as these an official survey is needed in order to establish the position of the land out of which the rentcharge which is to be registered issues. In areas in which registration of title is compulsory the costs of any necessary survey,[71] and any resultant revision of the registry's maps,[72] are carried out without cost to the applicant. These remarks apply to rentcharges created in a compulsory area even though they are not themselves compulsorily registrable.[73] In other areas the applicant is required to contribute towards the cost of a survey; the present [74] minimum fee charged being £9 9s. 0d.

In the case of newly created rentcharges which are intended to be registered, a verbal description of the charged land by reference to the street name and number is, as stated above, usually sufficient in the case of houses that have been in existence for some years, especially in the compulsory areas. But if a rentcharge issues out of undeveloped land it is almost invariably necessary to employ a plan for the purposes of identification; in any event a purchaser is probably entitled to require land to be described by plan.[75] Any

[69b] Perhaps he can successfully sue a local authority which has acquired a roadway subject to a rentcharge. See *Foley's Charity Trustees* v. *Dudley Corporation* [1910] 1 K.B. 317, C.A.

[70] *Cf.* Land Registration Rules, 1925, rr. 251, 278.

[71] Land Registration Fee Order, 1930, Fee Order Rule 4 (*b*).

[72] Land Registration Rules, 1925, r. 280 (2).

[73] Land Registration Act, 1925, s. 120 (1), proviso.

[74] January, 1960.

[75] *Re Sansom and Narbeth's Contract* [1910] 1 Ch. 741, 750: but see *Re Sharman's Contract* [1936] Ch. 755.

such plan prepared for the purposes of registration should accurately depict the physical features existing on the ground and be drawn to scale. It should show sufficient detail, including all boundary posts which have been erected to define the position of unfenced boundaries. An extract from a sheet of the ordnance map, if of a sufficient scale having regard to the nature of the property, is entirely suitable. If the plot out of which the rentcharge issues is not defined by boundary fences or walls or substantial posts on the ground, figured dimensions tying it to permanent physical features and also the dimensions of the plot itself should be given on the plan. These dimensions should be based upon actual measurements taken on the site. Plans on any scale may be used so long as they enable the position and extent of the land to be identified with precision on the Land Registry plans, but the scales most generally suitable are those between 40 feet to one inch (1/480) and 104·16 feet to one inch (1/1,250). It should be noticed, in passing, that before reproducing parts of official ordnance maps, a solicitor should obtain a licence from the Director-General, Ordnance Survey Office, Leatherhead Road, Chessington, Surrey. The annual fees are quite small.

Fees, etc.

The fees payable for first registration of a newly granted rentcharge are payable under scale 1 of the Land Registration Fee Order, 1930, on its value which, in the absence of evidence to the contrary, is taken at twenty times the amount payable in one year.[76] This applies whether the land lies in a compulsory or a non-compulsory area, and whether the rentcharge is created by a deed of grant or by a conveyance, or a Land Registry transfer. When registered land is transferred in consideration of a rentcharge further fees are, of course, payable for registration of the transfer of the land.[77] When a rentcharge is sold and the purchaser applies for first registration, the purchase price constitutes "evidence to the contrary" and the scale 1 fee will be based upon it. It is possible that if (in a non-compulsory area) the nature of the title causes an unusual amount of work or cost in the registry, or, if (in any area) the Chief Land Registrar finds it necessary to consult counsel about the title, the applicant will be asked to bear the additional costs, but he will incur no liability until the registry has approached him about the matter and he has agreed to pay the extra sum.[78]

[76] Land Registration Fee Order, 1930, para. I; Fee Order Rules, r. 11 (*a*).
[77] Land Registration Fee Order, 1930, para. I; Fee Order Rule 11 (*b*).
[78] *Ibid.* rr. 5, 8. This question is dealt with in a later article.

The application for first registration should be posted to the registry, and the fees may be paid for by a banker's draft, or by a postal or post office order, or by a cheque drawn to the order of The Commissioners of Inland Revenue.[79]

A deed of grant which creates a rentcharge without conveying freehold land and a conveyance of a rentcharge do not, of course, require a "produced" stamp.[80]

[*To be continued*]

[79] *Ibid.* r. 2.
[80] Under the Finance Act, 1931, s. 28.

THE MODERN LAW OF AGRICULTURAL HOLDINGS—I

I. Notices to Quit

By J. Muir Watt, m.a., Barrister-at-Law

Introductory

This is the first of a series of articles which are designed to direct the attention of the country practitioner to points of practical importance or difficulty in the present-day law of agricultural holdings. Matters which are only of academic interest, or which are seldom encountered in practice, have been ignored, however fascinating they may be from the point of view of legal theory.

Since legal assistance is likely to be sought in regard to problems connected with notices to quit at least as often as about any other agricultural holdings topic, it is proposed to begin by considering this subject, although it is not perhaps first in order of logical priority.

Notices to Quit: Common Law and Statute

Notices to quit agricultural holdings are subject to the common law rules affecting all notices to quit and to some special statutory rules which modify and supplement the common law rules. Thus, the notice to quit an agricultural holding must be properly served, must be clear and certain, must expire on the correct date, and so on, and it is, therefore, important to examine a notice to quit closely in order to decide whether it is valid and effective at common law before considering the impact of the special statutory rules which apply in the case of agricultural holdings. A tenant's adviser may, for example, find that the landlord's notice to quit is bad at common law because it is ambiguous or because it purports to terminate the tenancy on the wrong date. The tenant in such a case may not need to invoke the special protection given to tenants of agricultural holdings in order to defeat the notice, but he would have to be careful not to do or say anything which would imply a recognition of the common law validity of the notice. If he wishes both to preserve his right to challenge the validity of the notice at common law and, as an additional precaution, to take some step in accordance with the statutory security of tenure procedure, he should make it clear beyond doubt that he reserves all such rights as he may have to contend that the notice is bad. Otherwise, the

invocation of the statutory procedure might be held to imply an acceptance of the common law validity of the notice. This point is referred to again below.

The Statutory Rules: (1) Length of Notice

General rule

Most tenancies of agricultural holdings are yearly tenancies, although leases for fixed terms are sometimes found. At common law a yearly tenancy is, in the absence of express stipulation, determinable by half a year's notice expiring at the end of the first or any subsequent year of the term, but it is perfectly open to the parties to provide expressly for a longer or a shorter period of notice or for a notice which expires at some other time. By statute, however, at least twelve months' notice must be given to determine the tenancy of an agricultural holding unless the case falls within one of the specified exceptions in section 23 of the Agricultural Holdings Act, 1948. It should be noted that this twelve months' requirement applies not only to yearly tenancies but also to notices exercising options to break fixed terms of years [1] and to leases for two years or upwards which continue as yearly tenancies under section 3 of the 1948 Act, and that contracting out is expressly forbidden.

Exceptions

There are five exceptions to this twelve months' rule, which are set out in the proviso to section 23 (1) of the 1948 Act. Three of these can be dismissed quickly, namely, the case where a receiving order in bankruptcy has been made against the tenant; notices given under certain pre-1947 tenancies where the landlord is a service department, statutory undertaker, government department or local authority; and leases for a life or lives, etc., which are affected by section 149 (6) of the Law of Property Act, 1925. The two more interesting exceptions from the point of view of daily practice are the cases (1) where a notice to quit is given under a clause in the contract of tenancy authorising the resumption of the holding or some part of it for a specified non-agricultural purpose, and (2) where a notice is given by a tenant to a sub-tenant.

A trap for draftsmen

It is not uncommon to find in agricultural tenancy agreements a clause providing for the resumption of possession for some non-agricultural purpose or purposes such as building development.

[1] *Edell* v. *Dulieu* [1924] A.C. 38. See also *Gladstone* v. *Bower* [1959] 3 W.L.R. 815 at 819.

The drafting of such clauses is a trap for the unwary, since, although they may provide for less than twelve months' notice, they must not provide for a notice which is too short to enable the tenant, if he so wishes, to give preliminary notice, not less than one month before the termination of the tenancy, of his intention to claim more than the minimum disturbance compensation or to claim compensation for "high farming."[2] Thus, a clause which purported to enable the landlord to resume possession without giving any specified length of notice at all (a provision which is encountered in practice from time to time) or to resume possession on, say, giving one month's notice would be completely void. The draftsman, if he is wise, should provide for at least two months' notice. The reason why clauses which provide for a notice which is too short to enable the tenant to give in reply the one month's notice required by section 34 (2), proviso (*c*) or section 56 (1), proviso (*i*), should he so desire, is that they would offend against section 65 (1). Section 65 (1) is a provision of draconic severity which every draftsman concerned with agricultural holdings should have framed as a text above his desk, and which, subject only to express exceptions contained in the Act, invalidates any clause which purports to vary, diminish, postpone, frustrate or otherwise impair the statutory rights to compensation, whether by direct attack or by the inclusion of requirements which have a frustrating effect. It has a very far-reaching influence which is not always appreciated and it is a wise plan to re-read it before drafting anything that might have a bearing on rights to compensation (such as a surrender agreement). It is to be noted that if a resumption clause is void for the above reason the landlord cannot mend matters by actually giving the tenant a notice of sufficient length, say, two months. If the clause is void the tenant can successfully resist any action being taken under it at all.

Sub-tenants

The second exception of practical interest in the proviso to section 23 (1) is a notice given by a tenant to a sub-tenant (not vice versa). It is particularly noteworthy that this exception is not limited to the case where the tenant has been given notice to quit by his own landlord. It is quite general and gives a tenant *carte blanche* to give his sub-tenant less than twelve months' notice, subject, of course, to any express contractual provision, to the common law rules about length of notice, and to the security of tenure provisions of section 24 of the 1948 Act. A sub-tenant of

[2] See s. 34 (2), proviso (*c*), s. 56 (1), proviso (*i*), and the cases of *Re Disraeli Agreement* [1939] Ch. 382, and *Coates* v. *Diment* [1951] 1 All E.R. 890.

an agricultural holding is in a particularly weak position. As will be seen later, his position is vulnerable from the point of view of security of tenure. It is possible by the device of interposing a "tame" tenant between the landlord and the occupying sub-tenant to ensure that the latter can be dismissed without being able to claim security of tenure and without even the right to a twelve months' notice to quit. It is not suggested that this device is to be encouraged even from the landlord's point of view, since a feeling of insecurity may militate against good farming, but the reader should have the possibility in mind. A prospective tenant's advisers should, for example, consider the position carefully if the immediate landlord is to be a company which has itself only a tenancy created by the freeholder who has formed the company. In such circumstances the tenant holding from the company would have no certainty of security of tenure.

Length in excepted cases

In these excepted cases the actual length of the notice to quit which is required to be given depends on the terms of the contract and the established common law rules. Thus, if the contract is silent, the rule that half a year's notice is required to terminate a yearly tenancy will apply. The established law in regard to the date of expiry also applies, *e.g.*, that the notice should expire at the midnight separating the last day of the year of the tenancy from the anniversary of its commencement, with the rider that a notice specifying either day will normally be accepted as referring to that midnight.

The Statutory Rules: (2) Security of Tenure

General principle

Of all the provisions of the modern law of agricultural holdings, the most heavily charged with social significance are the security of tenure provisions. They represent a concession to the tenant farmer which ranks in importance with the statutory right to compensation for improvements, which was first placed on a sure basis by the Agricultural Holdings Act, 1883. Introduced by the Agriculture Act, 1947, and consolidated in the Agricultural Holdings Act, 1948, the security of tenure provisions have not been substantially altered by the Agriculture Act, 1958, although there have been changes in detail and in procedure. The method of giving the tenant security of tenure is to enable him, except in certain excluded cases, to challenge by a counter-notice the landlord's notice to quit within one month of receiving it and

thereby force the landlord to apply to the Agricultural Land Tribunal for consent to its operation if he wishes to preserve its effect. The 1948 Act does not expressly prohibit contracting-out of the security of tenure provisions, although it expressly prohibits contracting-out in other cases,[3] but it is thought that there is too much flavour of public policy about security of tenure for contracting out to be permitted. As Farwell J. put it in *Soho Square Syndicate, Ltd.* v. *E. Pollard & Co.*[4]: "Where in an Act there is no express prohibition against contracting out of it, it is necessary to consider whether the Act is one which is intended to deal with private rights only, or whether it is an Act which is intended, as a matter of public policy, to have a more extensive operation." He would, therefore, be a bold draftsman who would incorporate in a contract of tenancy a clause expressly excluding the security of tenure provisions or renouncing their protection on behalf of the tenant.

Security of tenure: when excluded

There are eight cases where the tenant's right to serve a counter-notice under section 24 (1), and thus to claim security of tenure, is excluded. It is most important to remember that in each of these cases the relevant fact or reason must be stated in the notice to quit if it is to have the effect of negativing the tenant's right to serve a counter-notice. The first seven cases are set out in section 24 (2) and the eighth is derived from article 10 of the Agricultural Land Tribunals and Notices to Quit Order, 1959 (S.I. 1959, No. 81). It is not proposed to deal with each case in complete detail but to call attention to any points of practical interest or difficulty. A detailed analysis will be found in the standard textbooks.[5] The cases are as follows:

(*a*) *Consent before notice*

Where the landlord has obtained the Agricultural Land Tribunal's consent to the notice to quit *before* serving it, and this fact is stated in the notice. The application to the Tribunal for such consent has to be made not less than three and not more than twelve months before the commencement of the twelve months' period at the end of which the notice is to take effect.[6] This procedure of obtaining consent before notice

[3] *Cf.* s. 23 (1) and s. 65 (1).
[4] [1940] Ch. 638, at 644.
[5] See Jackson and Muir Watt, *Agricultural Holdings* (11th ed.), pp. 48–54.
[6] Rule 2 (1) of the Agricultural Land Tribunals Rules, 1959, in the Schedule to the Agricultural Land Tribunals and Notices to Quit Order, 1959 (S.I. 1959, No. 81). The application has to be substantially in accordance with Form 1 in the Appendix to these Rules.

does not seem to be used as often as it might. Perhaps landlords or their advisers feel that it deprives them of the sporting chance that the tenant might fail to serve a counter-notice in time and thus eliminate the need for any application for consent.

(*b*) *Non-agricultural use*

Where the notice to quit is given (and so states) on the ground that the land is required for a non-agricultural use for which permission has been given on an application under the town and country planning legislation, or for which (for some reason other than one provided by such legislation) such permission is not required. The idea behind this exclusion is that the Ministry of Agriculture will already have been consulted about the propriety of the land's being diverted to a non-agricultural use either by the planning authority or, in the case paraphrased in parentheses above, by the government department concerned. The words in parentheses, it should be explained, cover notices to quit given by the Crown or government departments, to whom the town and country planning enactments do not apply, but who normally consult the Ministry of Agriculture by inter-departmental procedure. Thus, the assumption is that the diversion to non-agricultural use has been properly discussed and approved, and this is the justification for excluding the tenant's right to serve a counter-notice. It would seem from this analysis that the county court judge in *Teignmouth U. D. C.* v. *Elliott* [7] was wrong in thinking (he did not actually decide the point) that the words in parentheses might cover a non-agricultural use which is not technically development at all. It should be noted that where the landlord proposes to convert the land to a non-agricultural use which is not covered by this paragraph, the tenant's right to serve a counter-notice will not be excluded, but the landlord may succeed in obtaining consent on an application to the Tribunal under section 25 (1) (*e*). The draftsman should note that in both cases the landlord must give at least twelve months' notice to quit unless proviso (*b*) to section 23 (1) applies (notice given in pursuance of a clause in the contract of tenancy providing for resumption of possession for a specified non-agricultural purpose on less than twelve months' notice). It has been held that land is not *required* under this heading unless the landlord has a firm present intention of developing the land himself or disposing of it for development to an

[7] (1958) 108 L.J. 204.

identified person; merely to show a reasonable prospect of the use in question is not enough.[8]

(*c*) *Certificate of bad husbandry*

Where the landlord has obtained from the Agricultural Land Tribunal a certificate of bad husbandry against the tenant and the notice to quit states this fact. The time-table has to be carefully followed as it is possible to put a foot wrong here. The notice to quit cannot be given until after the certificate has been granted, but it must be given not more than six months after the *application* for (not the *grant* of) the certificate.[9] The time-table is now somewhat easier since the 1958 Act eliminated the County Agricultural Executive Committee stage and gave the Tribunal original (as distinct from appellate) jurisdiction.

(*d*) *Non-payment of rent and remediable breach*

Where the notice to quit is given (and so states) because at the date of giving it the tenant has failed to comply with a previous written demand from the landlord to pay within two months of the service of the demand rent then already due in respect of the holding, or has failed to comply with a previous written notice requiring him within a reasonable time, or within such reasonable period as was specified in the notice, to remedy a remediable breach of his tenancy agreement, provided that the term broken was not inconsistent with his responsibilities under the rules of good husbandry. It is highly probable that any country practitioner who has farmer or landowner clients will be called upon from time to time to consider this paragraph closely. The points which should be carefully noted are the following:

(1) A preliminary written notice is a necessary pre-condition of a notice to quit under this paragraph, unlike paragraph (*e*) below. Such preliminary notice should be clear and unambiguous and follow the wording of the paragraph.[10] If the preliminary notice is itself fatally defective it does not provide the necessary foundation for a notice to quit under section 24 (2) (*d*) and, therefore, it vitiates the latter. It will be seen that the drafting of the preliminary notice cannot be treated too

[8] *Jones* v. *Gates* [1954] 1 W.L.R. 222.

[9] See s. 27 (as substituted by the 1958 Act) for the new procedure. *Hewson* v. *Matthews* (1950) 100 L.J. 654 (C.C.) is still in point as to giving the notice after the actual grant of the certificate although the decision itself cannot be supported since *Cowan* v. *Wrayford* [1953] 1 W.L.R. 1340.

[10] See *Macnab of Macnab* v. *Anderson*, 1958 S.L.T. 8.

lightly. It should be done with the text of section 24 (2) (*d*) in front of the draftsman.

(2) If the preliminary notice relates to rent, the amount must be *already due and unpaid* at the date of the giving of the notice, not merely payable at some future date. The preliminary notice must require payment within two months of the giving of the notice, a requirement with which the tenant must not have "complied" (see below) at the date of the notice to quit. A mistake sometimes made (unfortunately a fatal one) is to serve the preliminary notice in respect of rent which is not yet due at the date of the notice. A reminder in regard to rent which is about to become due cannot be treated as a preliminary notice for the purpose of section 24 (2) (*d*).

(3) In the case of other breaches of terms of the tenancy, failure to remedy *any* of the specified breaches will, subject to the rule *de minimis non curat lex*, be sufficient foundation for the notice to quit. The tenant cannot avoid the consequences of his breaches by remedying, say, 90 per cent. of them in response to the preliminary notice.[11]

(4) The preliminary notice must be a peremptory notice to remedy, not merely an intimation that if the tenant fails the landlord will himself do the work and claim the cost.[12]

(5) The draftsman must be careful to give the tenant a reasonable time in which to do the work. If the preliminary notice specifies an unreasonably short time it will not provide a firm foundation for a notice to quit.

(6) The notice to quit must not be served prematurely, *i.e.*, before the time allowed by the preliminary notice has elapsed. Otherwise, the notice to quit will not take effect for the purpose of section 24 (2).[13]

(7) The notice to quit must make it quite clear that the landlord is relying on section 24 (2) (*d*), not section 24 (2) (*e*). It should not rely ambiguously on both or

[11] See *Edmunds* v. *Woolacott* (1959) 109 L.J. 204 (C.C.), but more fully reported on the above point in the *Journal of the Chartered Land Agents' Society* for March, 1959, p. 113.

[12] *Waller* v. *Legh* (1955) 166 E.G. 201 (C.C.).

[13] See *Cowan* v. *Wrayford* [1953] 1 W.L.R. 1340, at 1343, and *Hughes* v. *Taylor* (1950) 156 E.G. 141 (C.C.). See also *French* v. *Elliott* [1960] 1 W.L.R. 40, where the notice to quit based on the failure to pay rent just escaped being premature.

by a "calculated obscurity" refer to both in the hope that one will apply.[14]

(8) "Capable of being remedied" cannot be taken quite literally, since most breaches are capable of remedy if time is no object, even the cutting of timber on the grand scale. It has been suggested that the expression might be interpreted to mean "capable of being remedied within twelve months." This is a useful working rule, but there is no authority for it and it cannot be followed too blindly. This is a matter that might have to be decided by an arbitrator. Clearly, ordinary defects of repair to buildings, gates or fences are remediable in this sense.

(9) If after serving a preliminary notice requiring repairs the landlord agrees with the tenant to refer to arbitration the question what are the respective repairing liabilities (which are in dispute), he cannot use that notice as a basis for a notice to quit under section 24 (2) (*d*).[15]

(10) If a notice to quit under section 24 (2) (*d*) is based on the tenant's alleged failure (a) to comply with a preliminary notice to pay rent *and* (b) to comply with a preliminary notice to remedy breaches of covenant (other than the covenant to pay rent), the notice to quit may be effective in so far as it is based on failure to pay rent notwithstanding the fact that it cannot be effective in so far as it is based on the (other) breaches of covenants until after the termination of arbitration proceedings.[16]

(11) It is possible for two independent notices to quit to be served under section 24 (2) (*d*), say, one based on failure to pay rent and the other based on breaches of (other) covenants, and for one of these to take effect although the other fails. Thus, the operation of one of the notices to quit may be suspended pending the termination of arbitration proceedings but the other may in the meantime take effect.[16]

(12) Section 24 (2) (*d*) uses the expression: "At the date of the giving of the notice to quit the tenant had failed to comply." Does this mean that if the landlord allows an interval to elapse between the expiration of

[14] *Budge* v. *Hicks* [1951] 2 K.B. 335; *Macnab of Macnab* v. *Anderson*, 1958 S.L.T. 8.
[15] *Shepton Mallet Transport, Ltd.* v. *Clarke* [1953] C.P.L. 343.
[16] *French* v. *Elliott* [1960] 1 W.L.R. 40.

the time-limit set by the preliminary notice and the service of the notice to quit he thereby affords the tenant a *locus poenitentiae*? If during this interval the tenant pays the arrears of rent or remedies the breach, as the case may be, is the landlord prevented from taking advantage of section 24 (2) (*d*)? The answer given by a recent county court decision is, it is submitted, correct, namely, that after the expiration of the time-limit the tenant cannot possibly "comply" with the preliminary notice.[17] True, he can pay the rent or remedy the breach, but after the expiration of the time limit this is not compliance with the preliminary notice, even if it is a belated compliance with the obligations of the tenancy. It does not, therefore, prevent the landlord from relying on the default for the purpose of a section 24 (2) (*d*) notice to quit. He should, however, be careful about accepting rent or taking any other step before serving the notice to quit that might possibly be construed as a waiver of his right to proceed under section 24 (2). The landlord would, of course, be well-advised to lose no time after the expiration of the time allowed by the preliminary notice before he serves the notice to quit, but he must not take action prematurely.[18]

(*e*) *Non-remediable breach*

Where the notice to quit is given (and so states) because at the date of giving it the landlord's interest in the holding has been materially prejudiced by a non-remediable breach of the tenancy agreement by the tenant, provided that the term broken was not inconsistent with his responsibilities under the rules of good husbandry. No preliminary notice is necessary under section 24 (2) (*e*), in contrast with section 24 (2) (*d*). The notice to quit should make it quite clear that the landlord is proceeding under paragraph (*e*), not paragraph (*d*). It should not refer equivocably to both in the hope that one will apply.[19] "Material prejudice" could be evidenced by showing a substantial reduction in the value of the landlord's reversion due to the breach. "Not capable of being remedied" must be read with some limitation, since for this purpose a breach would be incapable of being remedied although it could be

[17] *Edmunds* v. *Woolacott*. See *ante*, note 11.
[18] See *ante*, p. 33.
[19] See *ante*, p. 33.

remedied by the expenditure of unlimited time and money, but it is not easy to formulate any precise limitation. In practice reliance on this paragraph will be less frequent than reliance on paragraph (*d*).

(*f*) *Bankruptcy and composition with creditors*

Where the notice to quit is given (and so states) because at the date of giving it the tenant had become bankrupt or compounded with his creditors. The only point here is that "become bankrupt" seems to require adjudication, if effect is given to the difference between this wording and that in section 23 (1), proviso (*a*), but this view is not universally accepted.[20]

(*g*) *Death of the tenant*

Where the notice to quit is given (and so states) because "the tenant with whom the contract of tenancy was made" had died within three months before the date of the giving of the notice. It is clear that the words quoted limit the amplitude of the definition of "tenant" in section 94 (1)[21] and probably exclude any assignees, whether by act of party or by operation of law. This, however, does not dispose of all the problems of the paragraph, since it could be argued that notice might be served on an assignee within three months of the death of the original tenant. There is no authority on this point, but it is submitted that the paragraph cannot operate at all after assignment and thus can only be invoked within three months of the death of the original or direct tenant provided that he was still holding as tenant (although he might have sub-let) at the time of his death. A few practical points arising under this paragraph may be noted:

(1) No landlord in his senses will grant a tenancy of an agricultural holding to joint tenants, but in the event of this being done paragraph (*g*) is to have effect as if the reference to the tenant with whom the contract of tenancy is made were a reference to the survivor or last survivor of the joint tenants, thus enabling a notice under the paragraph to be served within three months of the death of such survivor or last survivor. This is the effect of section 7 of the Agriculture (Miscellaneous Provisions) Act, 1954, reversing the effect of *Woodward* v. *Earl of Dudley*.[22]

[20] See Scammell's *The Law of Agricultural Holdings*, 3rd ed., p. 251.
[21] *Costagliola* v. *Bunting* [1958] 1 W.L.R. 580. It hardly seemed necessary to have a decision on this particular point.
[22] [1954] Ch. 283.

(2) No landlord in his senses should grant a tenancy of an agricultural holding to a corporate body, which is incapable of biological death and whose legal death by liquidation would not bring section 24 (2) (*g*) into play. Thus, a landlord who granted such a tenancy would deprive himself of one of the few chances of regaining vacant possession which are available today.

(3) No landlord in his senses should grant a tenancy of an agricultural holding which does not include a prohibition of assignment. If he does, he will, apart from other disadvantages, risk the loss of the chance of regaining possession under section 24 (2) (*g*).[23]

(4) Where section 24 (2) (*g*) applies, the landlord must act within three months of the death, but he may not know whether the tenant died intestate or made a will, or, if he made a will, who the executors are. It has, however, been established that a notice to quit addressed to the late tenant's " executors " will be effective although he died intestate, and that the person or persons who are in actual possession of the holding and carrying on the farming will be regarded as the agent or agents of the person or persons in whom the tenancy is legally vested for the purpose of service of a notice to quit.[24] Probably the best course, if it is doubtful whether the deceased died intestate or not, is to serve a notice both on the President of the Probate, Divorce and Admiralty Division (in case the legal tenancy is vested in him by virtue of section 9 of the Administration of Estates Act, 1925) *and* on the persons actually in control of the holding and managing the farming. The notice for the President should be sent to the Treasury Solicitor and the notice to the persons in control should be addressed to the personal representatives of the deceased tenant.

(5) It could happen that the tenant died and the landlord did not become aware of the death within the three months' period. To provide against this possibility there is some merit in including in the contract of tenancy a clause binding the tenant's personal representatives to take out probate or letters of

[23] The prohibition may be either absolute or qualified (not without consent) so long as in the latter case there is no *express* proviso that consent is not to be unreasonably withheld. There is no *implied* proviso to that effect in the case of agricultural holdings: see s. 19 (4) of the Landlord and Tenant Act, 1927, read in conjunction with s. 96 (2) of the 1948 Act.

[24] *Egerton* v. *Rutter* [1951] 1 K.B. 472; *Harrowby* v. *Snelson* [1951] 1 All E.R. 140; *Wilbraham* v. *Colclough* [1952] 1 All E.R. 979.

administration within, say, a month of his death and to notify the death to the landlord within, say, fourteen days of the grant. An action for damages would then lie against the deceased's estate for loss caused by a breach of this undertaking.

(6) A somewhat difficult situation arises where the landlord wishes to use section 24 (2) (*g*) with a view to selling with vacant possession, since section 30 may have the effect of invalidating the notice to quit if a contract of sale is made during its currency. The provisions of section 30 should be carefully considered before a contract for sale is made. Indeed, both section 24 (2) (*g*) and section 30 should be considered as soon as the tenant's death is known.

Exclusion of security in the case of sub-tenants

In addition to the cases mentioned in paragraphs (*a*) to (*g*) of section 24 (2), security of tenure is excluded in one other case, namely, where a notice to quit is given to a sub-tenant by a tenant who has himself been given a notice to quit by his landlord, and who states this fact in the notice to the sub-tenant.[25] The position of sub-tenants, however, deserves special consideration as a whole and will be dealt with later.

Exclusion of compensation for disturbance

In some but not all the cases where security of tenure is excluded, compensation for disturbance is excluded also. This applies in the cases mentioned in paragraphs (*c*), (*d*), (*e*), (*f*) and (*g*), but not in the cases mentioned in paragraphs (*a*) or (*b*) or in the case where the notice is given to a sub-tenant in the circumstances described immediately above. The rationale of this seems to be that compensation for disturbance is excluded where there has been an element of default on the part of the tenant or where the tenant's death has completely changed the situation.

Exclusion of security of tenure: two important rules of drafting

The landlord's advisers must bear in mind two important general rules laid down by the courts for the drafting of notices to quit which are intended to operate under section 24 (2). The first of these rules has been touched on above when dealing with paragraphs (*d*) and (*e*) of section 24 (2), but both rules deserve to be prominently set out. The first rule, which may be called the rule in

[25] See art. 10 of the Agricultural Land Tribunals and Notices to Quit Order, 1959 (S.I. 1959, No. 81).

Budge v. *Hicks*,[26] is that it must be made quite clear under what paragraph of section 24 (2) the landlord is proceeding and the nature of the facts on which he is relying, or the reason for the notice, as the case may be. It must, for example, be made clear whether the landlord is relying on paragraph (*d*) or (*e*). Ambiguity in this respect is not skilful tactics but a mistake, since it may prevent the notice from operating under section 24 (2) and, as a result of the next rule, may vitiate it altogether. Further, if the landlord is relying on section 24 (2) (*d*), both the preliminary notice and the notice to quit must be unequivocally referable to that paragraph. The second rule, which may be called the rule in *Cowan* v. *Wrayford*,[27] is that if the landlord wishes to have two strings to his bow and to rely on the notice to quit taking effect as an ordinary unqualified notice should he fail to establish a case under section 24 (2), he must make this abundantly clear either by framing the notice to quit explicitly in the alternative or by serving two separate notices. If he does not take this precaution, but pins his colours entirely to section 24 (2), and fails to substantiate the section 24 (2) ground, the view taken in *Cowan* v. *Wrayford* is that he cannot then fall back on the argument that the notice to quit operates at common law without qualification and that the reason alleged under section 24 (2) may be disregarded. This doctrine has been criticised by a learned author in *The Conveyancer*,[28] and it is true that the actual decision is *Cowan* v. *Wrayford* may be supported on a narrower ground, but the rule should be followed by landlords unless or until it is challenged in the House of Lords. It may be noted here that the mere addition of reasons to a notice to quit which is clearly *not* intended to operate under section 24 (2) will not invalidate it.[29] If, however, a notice to quit is not intended to operate under section 24 (2) it is inadvisable to incorporate reasons in it at all.

Arbitration in regard to the exclusion of security of tenure

Where it is stated in a notice to quit that it is given for one or more of the reasons specified in paragraphs (*b*), (*d*) and (*e*) of section 24 (2), and the tenant wishes to contest a reason stated therein, it is provided that he *shall*, within one month of the landlord giving the notice to quit, serve on the landlord a notice in writing requiring the question to be determined by arbitration

[26] [1951] 2 K.B. 335.
[27] [1953] 1 W.L.R. 1340.
[28] See article by C. M. Kidd in (1957) 21 Conv.(N.S.) p. 95.
[29] *Hammon* v. *Fairbrother* [1956] 1 W.L.R. 490.

under the 1948 Act.[30] The following points should be noted about this arbitration procedure:

(1) Arbitration applies to the cases mentioned in section 24 (2) (*b*), (*d*) and (*e*), *not* (*a*), (*c*), (*f*) or (*g*).

(2) In contrast with the pre-1959 procedure arbitration is now the *exclusive* method of challenging a reason stated in a notice to quit under section 24 (2) (*b*), (*d*) and (*e*). The tenant cannot now raise the matter in court proceedings instead.[31]

(3) If the tenant wishes to challenge a fact or reason alleged in the section 24 (2) (*a*), (*c*), (*f*) or (*g*) cases he should serve a counter-notice under section 24 (1) as a precaution and raise the matter in appropriate court proceedings.

(4) Normally, if the landlord is relying on section 24 (2) (*b*), (*d*) or (*e*), there is no point in the tenant's serving a counter-notice under section 24 (1) at the same time as a notice requiring arbitration. There might, however, be cases similar to *Hammon* v. *Fairbrother*,[32] where a landlord who at first sight appeared to have invoked section 24 (2) might be held not to have done so, and it would then be important for the tenant to have served a counter-notice in order to protect his position. But see also (6) below.

(5) If the landlord has served a notice to quit expressed to be in the alternative under section 24 (2) and operating as a simple unqualified notice, the procedure contemplated by article 7 of the 1959 Order[33] comes into operation and the tenant, if he succeeds in the arbitration, has a month from the termination of the arbitration in which to serve a counter-notice under section 24 (1). It has been pointed out above that the landlord can only fall back on the contention that the notice operates at common law as an unqualified notice if he has given the tenant due warning that he will do so.

(6) If the landlord serves two independent notices, one expressed to be under section 24 (2) and one expressed to operate as a simple unqualified notice the tenant's advisers, if they wish to resist, should serve a notice requiring

[30] Art. 6 of the Agricultural Land Tribunals and Notices to Quit Order, 1959 (S.I. 1959, No. 81), replacing reg. 4 of the Agriculture (Control of Notices to Quit) Regulations, 1948 (S.I. 1948, No. 190).

[31] Paull J. in *French* v. *Elliott* [1959] 3 All E.R. 866, at 871, agrees with this view.

[32] [1956] 1 W.L.R. 490.

[33] The Agricultural Land Tribunals and Notices to Quit Order, 1959 (S.I. 1959, No. 81).

arbitration in response to the first and a counter-notice under section 24 (1) in response to the second.

(7) The tenant is only restricted to the arbitration procedure where he wishes to contest a reason given in a notice to quit under section 24 (2) (*b*), (*d*) or (*e*). Therefore, apart from the section 24 (2) (*a*), (*c*), (*f*) and (*g*) cases, the tenant is not restricted to arbitration even in the section 24 (2) (*b*), (*d*) and (*e*) cases if he is challenging the notice on the ground that it is bad at common law for some reason such as uncertainty, ambiguity, material misdescription or the fact that it does not expire at the proper time.

(8) If the landlord serves a simple notice to quit, not invoking section 24 (2), the arbitration procedure has no application. The tenant should in such a case, if he wishes to resist the notice to quit, serve a counter-notice under section 24 (1) within the month of being given the notice to quit.

(9) There is no prescribed form for the tenant's written notice requiring arbitration, but it should follow the wording of article 6 of the 1959 Order.[34] If necessary it should expressly reserve any rights which the tenant does not wish to prejudice by requiring arbitration.

(10) The operation of the notice to quit is suspended until the termination of the arbitration.[35] This means that if it is due in the normal course to expire during the proceedings, and thus bring the tenancy to an end before the question for arbitration has been decided, it will not be permitted to have this effect.[36]

(11) Further, "where a notice to quit has effect in consequence of any such arbitration," which seems to mean where the landlord succeeds, the arbitrator may, either on his own initiative or on the tenant's application (made within fourteen days after the termination of the arbitration), postpone the termination of the tenancy by the notice for any period not exceeding twelve months if the notice would otherwise take effect on or within six months after the termination of the arbitration.[37]

(12) Finally, the scope of arbitration, where applicable, under the 1959 Order seems to be wider than under the old regulation 4 of the Agriculture (Control of Notices to Quit)

[34] The Agricultural Land Tribunals and Notices to Quit Order, 1959 (S.I. 1959. No. 81).
[35] Art. 8 of the Order cited in footnote 33.
[36] For a curious application, see the recent case of *French* v. *Elliott* [1960] 1 W.L.R. 40.
[37] Art. 9 of the 1959 Order cited in footnote 33.

Regulations, 1948. In *Jones* v. *Gates* [38] it was held that the question whether the reason alleged was a reason at all within the relevant paragraph of section 24 (2) was not a question "arising out of the reason" (the arbitration formula) as these words were not "apt to cover the question of the premises on which the validity of the notice rests." The wider words in article 6 of the 1959 Order, "contest a reason," would appear to enable a tenant to challenge matters going to the root of the reason alleged.

The next article in this series will deal with applications to the Agricultural Land Tribunal for consent to notices to quit and the grounds for giving such consent. It will also include some other matters which are of interest to the practitioner in regard to notices to quit agricultural holdings.

[38] [1954] 1 W.L.R. 222, at 226.

SALE BY THE EXECUTOR OF A TENANT FOR LIFE OF SETTLED LAND

By Sir Lancelot Elphinstone, Barrister-at-Law

Protection of the Purchaser

In my former article on this subject [1] I expressed the opinion that the power of the executor of a tenant for life to sell the settled land could be exercised only for the purpose of raising estate duty or money secured on the settled land by an equitable charge.[2] It followed, in my view, that a sale by the executor for an unauthorised purpose, such as acceding to a request by the next tenant for life that the land should be sold, would be a breach of trust, and the purchaser having notice of the fact would not get a good title.

A learned correspondent informs me that some conveyancing solicitors have been troubled by my article, and he suggests that I should consider the statutory provisions applicable for the protection of the purchaser.

The questions which arise, are: (1) What precautions should a purchaser take before accepting the executor's title? and (2) Will the purchaser be protected if he has accepted an invalid title? This question, of course, arises only if the executor did not in fact have power to sell. For instance, the executor may have had no power to sell for raising estate duty or for giving effect to an equitable charge. Nevertheless, if the next tenant for life was an infant, it might happen that the executor had power to sell under section 26 of the Settled Land Act. If that was so, the sale would be good although the purchaser had no knowledge of the executor's power.

Before going further, it is necessary to recall the case of *Re Duce and Boots Cash Chemists' Contract*.[3] In that case the vendor, the executor of a testator who died in 1931, assented to the vesting in himself in fee simple of the testator's freehold property. But recitals in the assent showed that under the will the executor held the property in trust for S. H., a person having the powers of a tenant for life. The purchaser objected to the title on the ground that the assent should have been a vesting assent in favour of S. H.

[1] (1959) 23 Conv.(N.S.) pp. 360–364.
[2] "Estate duty" is used throughout as including duty already paid but raisable under the Finance Act, 1894, s. 9 (5) and (6).
[3] [1937] 1 Ch. 642.

The vendor relied on section 36 (7) of the Administration of Estates Act, whereby an assent is "sufficient evidence" of the title of the assentee. Bennett J. held that the words "sufficient evidence" did not mean conclusive evidence, and that the vendor had not shown a good title. His Lordship said: "In my judgment, the meaning and effect of subsection (7) of section 36 is that a purchaser when investigating title may safely accept a vesting assent as evidence that the person in whose favour it has been made was the person entitled to have the legal estate conveyed to him unless and until, upon a proper investigation by a purchaser of the vendor's title, facts come to the purchaser's knowledge which indicate the contrary. When that happens, in my judgment, the vesting assent cannot be and ought not to be accepted as sufficient evidence of something which the purchaser has reason to believe is contrary to the fact, still less when, as in the present case, he knows it to be contrary to the fact."

It must also be noticed that all the Property Acts (except the Trustee Act) define "purchaser" as meaning "a purchaser in good faith"; and there seems no doubt that the word "purchaser" in the Trustee Act has the same meaning.

The relevant statutory provisions are as follows:

(1) By section 17 of the Trustee Act, "no purchaser or mortgagee, paying or advancing money on a sale or mortgage purporting to be made under any trust or power vested in trustees, shall be concerned to see that such money is wanted, or that no more than is wanted is raised, or otherwise as to the application thereof." And by section 68 (17) "trustee when the context admits includes a personal representative."

It seems that under this section, where the sale purported to be made under a power vested in the executor, the purchaser will prima facie obtain a valid title. But if *Re Duce* applies and the purchaser had actual notice that no money was wanted for payment of estate duty, the purchaser would not be protected by section 17. Of course, the money might be required for raising an equitable charge under section 16 of the Settled Land Act, but the purchaser would not be entitled to assume this unless the sale was expressed to be made in pursuance of section 16.[4]

My correspondent points out that a note on the probate that estate duty has been paid is not conclusive evidence that no more estate duty is payable. This is true, and it might be that the duty having been paid by the executor or a limited owner is still raisable. But it is suggested that where the purchaser has reason to believe

[4] See subs. (2).

that the settled land was exempt from estate duty on account of the value of the testator's estate or other reason, the purchaser ought to inquire as to the reason for the sale, and that, if he omits to do so, he runs a serious risk of being held to have actual notice of any infirmity in the executor's title.

(2) My correspondent also suggests that the purchaser will be protected by section 110 (3) of the Settled Land Act, whereby, if the capital money is paid to the personal representative, the purchaser of settled land is entitled to act on the assumption that the representative is acting under his statutory or other powers and requires the money for the purposes of administration. Assuming that this subsection applies to a sale by the executor of a tenant for life,[5] then if *Re Duce* applies, the purchaser having actual notice that no estate duty was raisable, would have to rely on his right to assume that the money was required for some other purpose of administration. The question would then arise, for what purpose of administration other than raising estate duty could the settled land be sold, and would the purchaser be acting in good faith if he ignored the provisions of sections 7 and 8 of the Settled Land Act?

The truth seems to be that by section 8 the executor, having raised the estate duty (if any), becomes a trustee for the beneficiaries. He is in fact in the same position as was an executor in respect of the testator's free real estate before 1926, who, having discharged all debts and liabilities of the testator, became a trustee and could no longer sell the land for purposes of administration.[6] This rule has been modified by section 36 (8) of the Administration Act, whereby a conveyance of a legal estate by a personal representative to a purchaser is not invalidated by reason only that all the debts, liabilities, funeral and testamentary or administration expenses, duties and legacies of the deceased have been discharged or provided for. But it seems clear that this subsection does not apply to a trust estate in settled land when the testator's beneficial interest in the land ceased on his death. Also, the subsection gives no additional power to an executor, its object being apparently to preserve the powers given to an executor by section 39 of the Administration of Estates Act "for purposes of administration, or during a minority of any beneficiary or the subsistence of any life interest, or until the period of distribution arrives," a provision which could not be intended to supersede the express provisions of the Settled Land Act as to the duties of the executor of a tenant for life.

[5] (1959) 23 Conv.(N.S.) p. 362.
[6] See Williams, *Vendor and Purchaser* (4th ed.), pp. 265, 287.

(3) Where the land was formerly subject to a vesting instrument, a subsequent purchaser will, it is thought, be protected by section 110 (5) of the Settled Land Act, whereby, if the conveyance does not state who are the trustees of the settlement for the purposes of the Act, the purchaser will be bound and entitled to act on the assumption that the person in whom the land was vested by the conveyance was entitled to the land free from the settlement.

It seems, therefore, that the protection of a purchaser who has accepted an invalid title depends on whether he had actual notice that the sale was not for any authorised purpose. "Actual notice" means "something more substantial than mere surmise or suspicion, however plausible, and . . . does not exclude knowledge of facts from which the existence of a certain state of things is reasonably to be inferred."[7] And I feel more than ever convinced that a purchaser should not be advised to accept a title from the executor of a tenant for life unless the purpose of the sale is disclosed and expressed in the conveyance to the purchaser. Refusal to give this information would, in my opinion, raise a suspicion and possibly be reason to believe that the sale was not for any lawful purpose.

[7] *Per* Eve J. in *Wise* v. *Whitburn* [1924] 1 Ch. 464, 470.

CONVERSION UNDER A CONTRACT FOR THE SALE OF LAND

By Philip H. Pettit, m.a., Barrister-at-Law

"I have always understood (and indeed it is a common-place) that when there is a contract by A to sell land to B at a certain price, B becomes the owner in equity of the land, subject, of course, to his obligation to perform his part of the contract by paying the purchase-money; but subject to that, the land is the land of B, the purchaser. What is the position of A, the vendor? He has, it is true, the legal estate in the land, but, for many purposes, from the moment the contract is entered into he holds it as trustee for B, the purchaser. True, he has certain rights in the land remaining, but all those rights are conditioned and limited by the circumstance that they are referable to his right to recover and receive the purchase-money. His interest in the land when he has entered into a contract for sale is not an interest in land; it is an interest in personal estate, in a sum of money. . . ." [1] This is a recent reaffirmation of one of the most familiar equitable principles going back at least to *Lady Foliamb's* case in 1651.[2] In Lord O'Hagan's phrase,[3] this is "rudimental doctrine" which can be found restated in many judgments [4] and repeated in all the relevant textbooks,[5] with hardly a dissentient voice.[6] Although this application of the doctrine of conversion is so well known, there seem to be some aspects of it which will repay further consideration. It should be made clear at this point that this article is concerned only with the doctrine of conversion in those cases where it arises under a

[1] *Hillingdon Estates Co.* v. *Stonefield Estates, Ltd.* [1952] Ch. 627, *per* Vaisey J., at p. 631; [1952] 1 All E.R. 853, at p. 856.

[2] Cited in *Daire* v. *Beversham* (1661) Nels. 76.

[3] In *Shaw* v. *Foster* (1872) L.R. 5 H.L. 321, at p. 349.

[4] See, *e.g.*, *Green* v. *Smith* (1738) 1 Atk. 572, *per* Lord Hardwicke; *Paine* v. *Meller* (1801) 6 Ves.Jnr. 349, *per* Lord Eldon; *Capel* v. *Girdler* (1804) 9 Ves.Jnr. 509, *per* Grant M.R.; *Wilson* v. *Clapham* (1819) 1 Jac. & W. 36, *per* Plumer M.R.; *Shaw* v. *Foster*, *supra*, *per* Lord Cairns; *Phillips* v. *Silvester* (1872) 8 Ch.App. 173, *per* Lord Selborne; *Lysaght* v. *Edwards* (1876) 2 Ch.D 499, *per* Jessel M.R.; *Lockharts* v. *Bernard Rosen* [1922] 1 Ch. 433, *per* Astbury J.; *Cumberland Consolidated Holdings, Ltd.* v. *Ireland* [1946] K.B. 264, *per* Lord Greene M.R.

[5] See, *e.g.*, *Dart on Vendors and Purchasers* (8th ed.), vol. 1, p. 265; *Emmet on Title* (14th ed.), vol. 1, p. 213; *Williams on Vendor and Purchaser* (4th ed.), vol. 1, p. 545.

[6] Brett L.J. said, in a dissenting judgment in *Rayner* v. *Preston* (1881) 18 Ch.D. 1: "It seems wrong to say that the one is a trustee for the other," but there is no doubt that it was Brett L.J. who was in error.

contract for the sale and purchase of real property, and references to conversion or the doctrine of conversion herein should be read in this limited sense.

Circumstances in which the Doctrine has been Applied

It seems generally to be assumed that the question of conversion or no conversion is susceptible of a simple yes or no answer. As will be shown later, it is doubtful whether this assumption is altogether valid, for it seems that it may happen that in one context a contract will have caused conversion, while at the same time in another context it may be held that no conversion has taken place. It appears desirable, therefore, in the first place, to distinguish the different circumstances in which the doctrine of conversion may be alleged to apply. In fact, the cases involving conversion fall into two main groups.

The first group of cases, which contains the earliest cases on the doctrine of conversion, is where either the vendor or the purchaser has died after the date of the contract but before the contract has been completed, leaving different persons entitled to his real and personal property.[7] This group of cases naturally divides into two, depending upon whether the question arises upon the death of the vendor or the purchaser.

On the death of the purchaser in such circumstances, the result was, before Locke King's Acts,[8] that the purchaser, by reason of the doctrine of conversion, was regarded in equity as having been the owner of the real property contracted to be purchased. Consequently the property, on the death of the purchaser, passed to the person entitled to his real property and, moreover, he would be entitled to have the purchase price paid by the personal representative out of the personal property. On the death of the purchaser, therefore, the question whether the doctrine of conversion applied was normally of vital importance.

Today, however, dispute is less likely to arise for two reasons. In the first place, as a result of Locke King's Acts,[8] on the death of a purchaser under such circumstances, although the person entitled to the real estate will still take by reason of the equitable doctrine of conversion, he will no longer be able to require that the

[7] This would be the usual position before 1926 on intestacy, when as a general rule real property descended to the heir-at-law, and personal property to the next-of-kin.

[8] The Real Estate Charges Acts, 1854, 1867, 1877, now repealed and replaced by the Administration of Estates Act, 1925, s. 35. This provision does not apply if the testator has signified a contrary intention. An attempt to show a contrary intention failed recently in *Re Birmingham* [1959] Ch. 523; [1958] 2 All E.R. 397, in which case the general doctrine of conversion under contract was reaffirmed.

purchase price be paid out of the personal estate, but will himself, as between the persons entitled to the deceased's estate, be primarily liable. Where the purchase price represents the market value of the property, the benefit to the person entitled to the real property is consequently limited to the amount of any deposit that has been paid. Secondly, no such question can now arise on intestacy, since real and personal estate now devolve in the same way [9] and it is increasingly usual for testators to dispose of their residuary real and personal estate in one mass.

Where it is the vendor who has died, there does not seem to be any doubt but that, as between the persons entitled to his real and personal estate, the doctrine operates to give the person entitled to the personal property the right to receive the purchase-money. Most of the cases appear to have arisen where the vendor had died testate, having made a disposition in his will of the property the subject of the contract. In such circumstances it is well established, where the will precedes the contract,[10] that the devise is revoked or adeemed, and in any case, whether there is a will or not, the land is converted and the purchase-money is treated as a part of the vendor's personal estate and passes accordingly. In the case of a devise in a will which precedes the contract, there is said to be revocation by alteration of estate, the doctrine of conversion operating on the contract to dispose of the estate in equity in the same way as a conveyance would dispose of the estate at law.[11] This view, it is submitted, is to be preferred to the alternative ground, namely, revocation by expression of contrary intention put forward by Turner L.J. in *Andrew* v. *Andrew*.[12] There T. devised certain real estates to the plaintiff, and by a subsequent agreement contracted to sell part of the same estates to P., who paid a deposit and entered into possession. P. became bankrupt and his assignees sold the estate he had contracted to buy to T. who re-entered and remained in possession thereof until his death. It was held that the estate nevertheless did not pass to the plaintiff under the devise. Turner L.J. said [13]: "the doctrine of the courts of equity rested either on the ground that the contract operated like a conveyance at law and altered the estate, or else on the ground of expressing the intention of the testator to revoke the devise. The cases proceeded upon the assumption that the revocation took place at the

[9] See now the Administration of Estates Act, 1925, especially s. 33.

[10] *Farrar* v. *Earl of Winterton* (1842) 5 Beav. 1. Where the will is subsequent to the contract, the doctrine of conversion again applies, but it is a question of construction of the will whether the disposition in the will extends to the purchase-money. See, *e.g.*, *Re Calow* (1928) Ch. 710.

[11] See (1957) 21 Conv.(N.S.) 152.

[12] (1856) 4 W.R. 520.

[13] *Ibid.* at p. 522.

time of making the contract, and a subsequent abandonment of the contract would not restore the devise." In the case of the death of the vendor there is no provision corresponding to section 35 of the Administration of Estates Act, 1925. It is still the law, therefore, that where there is a valid contract which calls into play the doctrine of conversion, the devisee, or, before 1926, the heir-at-law on an intestacy, gets nothing at all, and the purchase price becomes a part of the vendor's personal estate and devolves accordingly. Of course, no distinction is made between real and personal property on intestacy since 1925.[14]

The second main group of cases concerns the duty of the vendor to maintain and keep in repair the property the subject of the contract. Where a dispute arose between vendor and purchaser the Court of Chancery held that the doctrine of conversion had made the purchaser owner in equity of the property, while the vendor retained merely the legal estate. Consequently, as always where there is separation of legal and equitable ownership, the vendor was regarded in equity as a trustee for the purchaser, and from this it was successfully contended that the vendor-trustee must, like any other trustee, take proper care of the trust property. This application of the doctrine of conversion to the problem of the vendor's duty in regard to the property seems to have been well established by the early nineteenth century,[15] and the cases on it have been chiefly concerned with delimiting the exact scope of his duties as trustee. Although the cases have cast no doubt on the proposition that he is a trustee, it has been observed that "he is only a trustee in a modified sense,"[16] or "a quasi-trustee."[17] As Jessel M.R. put it,[18] "He is certainly a trustee for the purchaser, a trustee, no doubt, with peculiar duties and liabilities, for it is a fallacy to suppose that every trustee has the same duties and liabilities; but he is a trustee." The reason for the special nature of the relation of trustee and *cestui que trust* in this case is, of course, the need to protect the vendor. In Lord Cairns's words the relation is "subject to the paramount right of the vendor and trustee to protect his own interest as vendor of the property."[19] This application of the doctrine is now firmly established, but it is perhaps unfortunate that the duty of the vendor was based upon

[14] Qualifications to this proposition are unimportant for present purposes.
[15] *Wilson* v. *Clapham* (1819) 1 Jac. & W. 36 is, perhaps, the earliest reported case, but there is no suggestion that the application of this doctrine in this case was in any way a novelty.
[16] *Royal Bristol Permanent Building Society* v. *Bomash* (1887) 35 Ch.D. 390, *per* Kekewich J., at p. 397.
[17] *Cumberland Consolidated Holdings, Ltd.* v. *Ireland* [1946] K.B. 264, *per* Lord Greene M.R. giving the judgment of the Court of Appeal, at p. 269.
[18] In *Earl of Egmont* v. *Smith* (1877) 6 Ch.D. 469, at p. 475.
[19] *Shaw* v. *Foster* (1872) L.R. 5 H.L. 321, at p. 338.

his position of trustee: it is submitted that it would have been as easy and rather more satisfactory to have put the duty upon the ground of an implied term in the contract.

Although most of the cases on this species of conversion fall into one of the above two groups, the doctrine has occasionally been applied in other circumstances. An example is *Gordon Hill Trust* v. *Segall*,[20] where the purchaser under a contract entered into a sub-sale, and the main question, arising out of the sub-sale, was whether it was a fraudulent misrepresentation for the vendor under the sub-sale to allow himself to be described as owner of the property.

A Valid Contract and Defects of Title

The next matter which will be considered is the proposition that where there is no valid contract there will be no conversion. The most elaborate judicial discussion as to what is meant by a valid contract in this context is to be found in the judgment of Jessel M.R. in *Lysaght* v. *Edwards*.[21] After stating that the doctrine of conversion comes into play only where you have a valid contract of sale, Jessel M.R. went on to point out that as regards real estate, in addition to the requirements of the ordinary law of contract, there is not a valid contract unless the vendor is in a position to make title according to the contract, or the purchaser has accepted the title notwithstanding the fact that it is not a good one. Subject to the availability of the remedy of specific performance (as hereafter discussed) and to one further qualification to be mentioned shortly, the position seems to be that if there is a valid contract in the above sense, there is conversion as from the date of the contract, while if there is no valid contract there is no conversion at all.[22] Perhaps not surprisingly, the cases raising this point all seem to have arisen in substance on the question as to who is entitled in the estate of a deceased vendor or purchaser and the relevant time for this purpose is the date of death, what happens thereafter being irrelevant.

Arising out of the death of the purchaser were *Whittaker* v. *Whittaker*,[23] *Hudson* v. *Cook*[24] and *Broome* v. *Monck*.[25] In the

[20] [1941] 2 All E.R. 379, discussed in more detail later. See also *Rose* v. *Watson* (1864) 10 H.L.C. 672.

[21] (1876) 2 Ch.D. 499.

[22] It should be observed that a contract which is "not valid" in this sense and which does not result in conversion may, in ordinary contract law and terminology, be voidable, *i.e.*, *valid* unless and until avoided. An action for damages for breach of contract may accordingly lie, though in practice the measure of damages would usually be severely limited by the rule in *Flureau* v. *Thornhill* (1776) 2 W.Bl. 1078 and *Bain* v. *Fothergill* (1874) L.R. 7 H.L. 158. This rule means that a purchaser will often, probably usually, prefer to rescind and claim *restitutio in integrum*.

[23] (1792) 4 Bro.C.C. 31.

[24] (1872) 13 Eq. 417.

[25] (1805) 10 Ves.Jnr. 597.

first two of these cases it was held that, since the vendor had a good title and there was a valid contract, there was conversion, and it made no difference that in *Whittaker* v. *Whittaker*[26] the contract was not completed, and the vendor held to be released from his obligations, because it was impossible for the contract to be completed within a reasonable time owing to difficulties in the administration of the deceased purchaser's estate; and in *Hudson* v. *Cook*[27] that the vendor subsequent to the death rescinded the contract under a power reserved to him in the contract. On the other hand in *Broome* v. *Monck*[28] it was held that, since the vendor could not show a good title, there was no valid contract and therefore no conversion. It was further stated clearly that the person entitled to real estate could not accept a bad title and, in accordance with the old law, require the purchase price to be paid out of the personal estate. There is no reason to think that this rule has been in any way affected by Locke King's Acts, which would generally mean that on any view the advantage to the person entitled to real estate would be restricted to the amount of any deposit paid.

With regard to cases arising out of the death of the vendor, as to who is entitled in his estate, in *Curre* v. *Bowyer*,[29] where there was a valid contract at the vendor's death, the vendor was held, under the doctrine of conversion, to have had only an interest in personalty, although a specific performance action against his representative by the purchaser had been subsequently dismissed on the ground of the purchaser's laches. On the other hand in *Re Thomas*[30] the vendor had not got a good title and it was held that there was consequently no valid contract and no conversion. On the basis of the principles stated, it seems that Kay J. was right in this case in considering that it was irrelevant that the purchaser might have been able to compel specific performance of the contract with compensation, though it is perhaps less satisfactory than it sounds to put this on the ground that it would not be a performance but an alteration of the contract.[31] Presumably, it would make no difference that, subsequently to the vendor's death, the purchaser agreed to accept a bad title.[32] In such case, if the purchaser should thereafter die, the result would seem to be that

[26] *Supra.*
[27] *Supra.*
[28] *Supra.*
[29] (1818) 5 Beav. 6n.
[30] (1886) 34 Ch.D. 166.
[31] It should be observed that the purchaser was in a position to obtain a decree of specific performance without any alteration, if he chose to waive the defect in the title.
[32] The purchaser's right to do this cannot be affected by the vendor's death, and *per* Jessel M.R. in *Lysaght* v. *Edwards*, *supra*, at p. 507, "however bad the title may be the purchaser has a right to accept it."

in regard to persons claiming under the vendor, there would be no conversion, while in regard to persons claiming under the purchaser there would. This result may, perhaps, seem a little inelegant, but would cause no particular difficulty so long as one was concerned only with the independent administration of different estates. The position is less satisfactory, however, when one considers that one may also have to resort to the doctrine of conversion to solve disputes between vendor and purchaser or their representatives as to the vendor's duties while he retained possession. Presumably, acceptance of the title by the purchaser thus constituting a valid contract means that there will be a conversion for this purpose and it seems, accordingly, that a case might arise where the personal representatives of the vendor would be required to treat the property as converted *vis-à-vis* the purchaser, but as not converted *vis-à-vis* the beneficiaries.

The case where the purchaser accepts a bad title and thereby constitutes a hitherto invalid contract valid brings us to the qualification which it was stated existed to the proposition that, if there is a valid contract, there is conversion as from the date of the contract. The problem is whether, when a bad title is accepted, there is conversion as from the moment of acceptance of the title or whether the conversion relates back to the date of the contract. In cases in connection with the administration of estates the problem will not arise, for it seems that the question there is simply whether there is a valid contract at the date of death. But the answer to the problem may be vital if the property has deteriorated between the date of contract and the date of acceptance due to the failure of the vendor to carry out ordinary repairs. There does not seem to be any reported case where this problem has arisen but, although on principle it is difficult to see any sufficient argument for ante-dating the effect of the validating of the contract, it is submitted that practical considerations might well induce the court to hold that conversion related back to the date of the contract.[33] On the other hand there is a judicial dictum that "the retrospective conversion of a person into a trustee of property is a result eminently inconvenient"[34] and the only admitted case of conversion of any kind which has a retrospective effect, namely that arising under the rule in *Lawes* v. *Bennett*,[35] has been almost universally condemned as an anomalous exception.

[33] An alternative view might conceivably be that a contract which is not a valid contract and accordingly does not cause conversion in the estate of a deceased vendor and purchaser may nevertheless be effective to cause conversion as between vendor and purchaser.

[34] *Edwards* v. *West* (1878) 7 Ch.D. 858, *per* Fry J., at p. 862.

[35] (1785) 1 Cox.Eq. 167.

Further, Fry J. refused [36] to apply the rule to a dispute between vendor and purchaser as opposed to a case arising between the persons entitled to the estate of a deceased vendor. An attempt to rely upon the analogy of *Lawes* v. *Bennett* [37] for this purpose would be less convincing in view of the fact that under the rule established by that case it has been held that there is no retrospective effect so far as intermediate profits are concerned.[38] It is submitted that the difficulties involved in basing the duty of the vendor to maintain the property on his position as trustee could have been more easily solved if the duty had been based upon an implied term in the contract.[39]

Defect of title is commonly regarded as falling within the ambit of misdescription. Terminology is, unfortunately, unsettled but it is proposed here to use the term misdescription as relating to either quantity, estate or right, thereby including a defect in title, and to restrict it to cases where the effect is that the vendor is unable to convey to the purchaser property corresponding to that which he has contracted to convey.

Misdescription is, accordingly, inevitably a breach of contract on the part of the vendor, and one which, if at all substantial, entitles the purchaser to rescind the contract. Support is given to the view that defect of title is properly regarded as a species of misdescription by the fact that it is only in cases of misdescription, including defect of title, that the special remedy of specific performance with compensation is available.[40] In practice, this remedy is less likely to be granted where there is a defect in title than in other kinds of misdescription, for in this case the requirement that the compensation must be capable of being fairly assessed in money terms is less likely to be satisfied. But that the remedy is available is well established.[41] There do not appear to be any decisions on misdescription in this context apart from those on defect of title, but it is submitted that the effect of every

[36] In *Edwards* v. *West*, *supra*.

[37] *Supra*.

[38] *Townley* v. *Bedwell* (1808) 14 Ves. 591.

[39] Doubtless difficulties could be suggested with regard to the implied term theory. It seems too late for the theory to be adopted now and discussion of it would therefore be fruitless.

[40] This remedy will only be available to the vendor where the misdescription was made innocently and where the deficiency is small and immaterial: it will be available to the purchaser, even though the deficiency is substantial, provided compensation can fairly be assessed: *Earl of Durham* v. *Legard* (1865) 34 L.J.Ch. 589; *Rudd* v. *Lascelles* [1900] 1 Ch. 815; and see generally *Rutherford* v. *Acton-Adams* [1915] A.C. 866, especially *per* Viscount Haldane at pp. 869–870.

[41] *Bolingbroke's Case* (*circa* 1787) 1 Sch. & Lef. 19n., cited 2 Ph. 605; *Western* v. *Russell* (1814) 3 V. & B. 187; *Nelthorpe* v. *Holgate* (1844) 1 Coll. 203; *Barker* v. *Cox* (1876) 4 Ch.D. 464.

sort of misdescription should be the same. If this is right the result of misdescription will always be that there is no valid contract and therefore no conversion.

Specific Performance

Absence of written evidence

It is frequently said that conversion is intimately connected with the availability of the remedy of specific performance. In a well-known passage in *Holroyd* v. *Marshall*[42] Lord Westbury L.C. said: "In equity it is not necessary for the alienation of property that there should be a formal deed of conveyance. A contract for valuable consideration, by which it is agreed to make a present transfer of property, passes at once the beneficial interest, provided the contract is one of which a court of equity will decree specific performance. In the language of Lord Hardwicke, the vendor becomes a trustee for the vendee; subject, of course, to the contract being one to be specifically performed." Elsewhere Lord Parker of Waddington giving the advice of the Judicial Committee of the Privy Council[43] has observed: "It is sometimes said that under a contract for the sale of an interest in land the vendor becomes a trustee for the purchaser of the interest contracted to be sold subject to a lien for the purchase-money; but however useful such a statement may be as illustrating a general principle of equity, it is only true if and so far as a court of equity would under all the circumstances of the case grant specific performance of the contract." Where there is a valid contract in the sense in which it has been discussed above, in most cases the contract will be specifically enforceable by both the vendor and the purchaser. The question that arises is as to the effect of a valid contract which is not so enforceable. The fullest judicial discussion of the problem appears to be in the judgment of Gibson J. in the Irish case of *Crowe* v. *Menton*.[44] The discussion is clearly *obiter*, being concluded by the observation, "the point is not necessary to decide in this case," and, although it recognises that there may, perhaps, be conversion where the question arises in the administration of the estate of one party to the contract and at the same time there may be no conversion in the administration of the estate of the other, it takes no account of problems of conversion in other contexts, such

[42] (1862) 10 H.L.C. 191, at pp. 209–210.

[43] In *Howard* v. *Miller* [1915] A.C. 318, at p. 326. See also *Cornwall* v. *Henson* [1899] 2 Ch. 710; reversed by C.A. on different grounds [1900] 2 Ch. 298.

[44] (1891) 28 L.R.Ir. 519.

as where a question of maintenance of the property arises between vendor and purchaser. The most relevant part of the judgment reads as follows[45]: "Where a party is not bound by a valid contract at his death, whether he be vendor or purchaser, it is certain that his representative is not entitled to insist on conversion, and cannot maintain a suit for specific performance. Thus, if an owner signs a contract to sell to a purchaser, and the latter has not signed, on the death of the latter it is clear his heir could not enforce conversion: *Rose* v. *Cunynghame*,[46] *Buckmaster* v. *Harrop*.[47] Would the vendor's estate in such a case be converted? Or to effect conversion, must both parties be bound? Where the vendor has a bad title, the purchaser is entitled to waive the defect, and insist on getting the estate. It is, however, settled that in such a case there is no conversion. Language is to be found in the judgments of Sir G. Jessel in *Lysaght* v. *Edwards*,[48] and of Sir E. Fry in *Edwards* v. *West*[49] which seems rather to point to the necessity of the contract being reciprocally enforceable. During the argument, I asked, was there any authority on the point? None was cited, but it was assumed as clear (in accordance apparently with Mr. Dart's[50] view) that if a vendor entered into a contract which might be enforced,[51] the estate comprised in the contract was converted,[52] though the purchaser was not bound, and the sale was never completed."

Where the remedy of specific performance is not available by reason of non-compliance with section 40 of the Law of Property Act, 1925, there seems no doubt both on principle and authority but that on the death of the party to the contract who is not bound by reason of the statute there is no conversion in his estate. The leading authority on the death of the purchaser is *Buckmaster* v. *Harrop*[53] when Grant M.R. said: "I am of opinion, the court cannot speculate upon what the deceased would or would not have

[45] *Ibid.* at pp. 524–525.
[46] (1805) 11 Ves. 550.
[47] (1802) 7 Ves. 341.
[48] (1876) 2 Ch.D. 499, at pp. 506–507.
[49] (1878) 7 Ch.D. 858, at p. 862.
[50] In fact, Mr. Dart seems to have taken a different view. Both in the 6th ed. of *Vendors and Purchasers*, at p. 301, current when *Crowe* v. *Menton* was decided and in the 8th ed., the latest edition, at p. 276, the view is expressed that if at the vendor's death the contract is capable of being enforced only against and not by him, whether there is conversion in the estate of the vendor depends upon whether or not the purchaser chooses to enforce specific performance.
[51] From the context this presumably means enforced against the vendor.
[52] Presumably this is answering the question, "Would the vendor's estate in such a case be converted?" for the judge has already stated that in such a case there would be no conversion in the purchaser's estate.
[53] *Supra.* The principle here stated was approved by Lord Eldon in *Broome* v. *Monck* (1805) 10 Ves. 597.

done; but the inquiry must be, whether at his death a contract existed, by which he was bound and which he could be compelled to perform. That alone can give the heir a right to call for the personal estate to be applied, or to the personal representative a right to call on the heir. . . . The principle upon which the court acts for or against the heir, is stated in *Att.-Gen.* v. *Day*[54] and *Lacon* v. *Mertins.*[55] The question must be the same, whether a purchase or a sale is insisted on: was the ancestor himself bound?" Where the question arises on the death of a vendor, who is not bound by reason of the statute there is likewise no conversion, the authority being *Re Harrison*,[56] which, it is submitted, rightly follows the above principle and is to be preferred to the statement appearing in *Jarman on Wills*[57] which apparently says that in such case the test is whether the contract is enforceable by the deceased vendor.

In the converse case, where by reason of section 40 of the Law of Property Act, 1925, one party to the contract is bound, and the other not bound, and where the question arises in the estate of the one who was bound, there is no clear authority. As we have seen it seems to have been assumed in *Crowe* v. *Menton*[58] that there would be conversion, at any rate where the vendor was the party who was bound: Dart,[59] as already mentioned, suggests that in such case, where the vendor alone is bound, whether there would be conversion or not in his estate would depend on whether the purchaser in fact enforced specific performance. Jarman,[60] in discussing the converse case where the purchaser is bound and the vendor not, after noting the complete dearth of authority, suggests that it depends upon what the vendor in fact chooses to do. Both Dart and Jarman draw an analogy with *Lawes* v. *Bennett.*[61] While one hesitates long before venturing to differ from the views of Dart and Jarman in the absence of compelling authority, it is submitted that the dictum in *Crowe* v. *Menton*,[62] the inconvenience of retrospective conversion,[63] the undesirability of leaving the rights of the beneficiaries in the estate of one party dependent upon the act of the other party, and analogy with the case next dealt with,

54 (1749) 1 Ves.Sen. 218.
55 (1743) 3 Atk. 1.
56 (1886) 34 Ch.D. 214. But note *Frayne* v. *Taylor* (1864) 9 L.T. 706 where the heir-at-law of the vendor failed to take advantage of the absence of writing and actually completed the contract, and it was held that the proceeds of sale must, under the doctrine of conversion, be treated as part of the personal estate of the deceased vendor.
57 8th ed., Vol. II, 739.
58 *Supra.*
59 *Vendors and Purchers* (8th ed.), Vol. I, p. 276.
60 *Op. cit.*, p. 746.
61 (1785) 1 Cox Eq. 167.
62 *Supra.*
63 See the dictum in *Edwards* v. *West*, *supra*, referred to above.

weight the scales in favour of the view that where there is a valid contract, on the death of one of the parties thereto, there is conversion in his estate where the contract was specifically enforceable against him, even though he himself may have been unable to obtain the like remedy owing to the absence of the necessary writing.

There does not seem to be any place where it has been considered whether there is conversion where one party only is bound, apart from cases where one party had died and questions have arisen as to who is entitled in his estate. As already mentioned the only other type of case (apart from isolated instances) is in connection with maintenance of the property: no question will arise if the contract is not completed: if it is, the considerations would seem somewhat similar to those discussed in connection with defect of title where a bad title is accepted by the purchaser, though in this case there is, perhaps, more to be said for the view that conversion will be effective from the date of the contract.

Right to rescind

Next we may consider the case where the remedy of specific performance is not mutual by reason of the fact that one party has a right, under the contract, to rescind it. Where the question arises in the administration of the estate of the person who has the right of rescission and is consequently not bound there is no clear authority but it may well be that, by analogy with *Gordon Hill Trust* v. *Segall*,[64] there is conversion notwithstanding the existence of the power of rescission. It might, however, be argued that the principle of *Buckmaster* v. *Harrop* [65] should be applied. On the other hand where the question arises in the estate of the person who is bound, it has been held that there is conversion, even though the remedy is not mutual and the other party in fact exercises his right of rescission so that the contract is never completed. This, it will be recalled, was the situation in *Hudson* v. *Cook* [66] where, after the death of the purchaser, the vendor rescinded the contract under a power reserved to him therein, and it was held that there was nevertheless a conversion in the deceased purchaser's estate. There seems no reason to doubt that if the purchaser is the one with the right of rescission, there will correspondingly be conversion in the estate of the vendor upon his death.

An important and unusual case, not, however, arising in the course of adminstration of the estate of a deceased vendor or purchaser, is *Gordon Hill Trust* v. *Segall*.[67] Here the contract

[64] [1941] 2 All E.R. 379. Discussed fully *post*.
[65] *Supra*.
[66] (1872) 13 Eq. 417.
[67] *Supra*.

provided, in clause 6: "The vendors will make all reasonable endeavours to find suitable accommodation for the pupils of the Convent of Our Lady's High School, for which the hereditaments hereinbefore described are used, but vacant possession of the premises will not be given, and completion of the purchase will not take place, until such other accommodation is found. In the event of the completion of the purchase being delayed for a period of more than two years from the date hereof on account of the inability of the trustees of the convent to find suitable accommodation for its pupils then the purchasers will be entitled to rescind this contract and be discharged from all liability hereunder." More than two years after the date of the contract, when the power of rescission had become exercisable, the purchaser entered into a contract of sub-sale. The action was for fraudulent misrepresentation on the ground that, in the negotiations for the sub-sale of the property, the original purchaser had allowed himself to be described as owner of the property when he was not. In the Court of Appeal, Luxmoore L.J., in a judgment in which MacKinnon L.J. and Stable J. concurred, after stating that in his view the original purchaser's actions were only explicable on the ground that he thought that he had become in equity owner of the property,[68] went on to say [69]: "In that belief it seems to me that he was well-founded, because, as I read the contract and the cases which have been repeatedly relied on, he was in fact the owner of the property." In other words, it was held that there was conversion so far as the purchaser was concerned, although at the relevant time he was no longer bound by the contract since the power of rescission given to him by the contract had become operative. It is submitted that the most satisfactory explanation of this case is that where there is a valid contract the fact that one, or indeed both, of the parties may under the contract itself have a power to rescind it does not affect the operation of the doctrine of conversion unless and until the power of rescission is exercised. In such case there is a valid contract in conditional terms which binds both parties unless and until the contractual power of rescission is exercised, and it is submitted, as suggested above, that on the death of the party with the power of rescission, the property should be treated as converted in the administration of his estate. If this be right, the same principle would presumably apply to a dispute between vendor and purchaser as to the maintenance of the property between contract and completion.

[68] Thus disposing of the allegation of fraud.
[69] *Supra*, at p. 391.

Misrepresentation and Laches

Something must now be said of certain factors which have deliberately been omitted from the two preceding sections. It will be recalled that the cases referred to in the first of these sections appeared to establish that there will be no valid contract and no conversion where the vendor's title is defective, while in the other section the position as regards conversion where the remedy of specific performance was not mutual by reason of the effect of section 40 of the Law of Property Act, 1925, or because of some appropriate provision in the contract, was discussed. Nothing has been said so far, however, of the effect of other matters which may disentitle a party from obtaining a decree of specific performance such as mistake, misrepresentation [70] and laches. Operative mistake causes no difficulty, for its effect is to make the contract void *ab initio* so that there will be no conversion. It is more difficult to ascertain the effect of misrepresentation or laches.

Taking misrepresentation first, it might be thought that if misdescription has the effect of making the contract not valid, then *a fortiori* misrepresentation would have the same effect.[71] Certainly, so far as remedies are concerned, there seems to be a clearer recognition of the existence of a contract where there is misdescription than where there is misrepresentation. This, it is submitted, follows from the existence of the special remedy of specific performance with compensation, which is available in cases of misdescription alone,[72] and from the fact that misdescription is a breach of contract for which damages will be recoverable.[73] Support can be found for this view in the judgment of Cozens-Hardy J. in *Cornwall* v. *Henson*,[74] where he equated the effect of a defect in title and a collateral misrepresentation, but it is difficult to reconcile this with the decision of the highest tribunal in *Rose* v. *Watson*.[75] In discussing this case one has first to go back to an earlier case arising out of the same facts. This is the decision in *Myers* v. *Watson* [76] in which the Vice-Chancellor, Lord Cranworth,[77]

[70] Presumably other precedent defects, such as duress and undue influence, would have the same effect as misrepresentation. There is no authority.
[71] See n. 22, *supra*.
[72] See *Gilchester Properties, Ltd.* v. *Gomm* [1948] 1 All E.R. 493.
[73] Damages can be recovered where there is rescission for fraudulent misrepresentation but this is in a distinct claim in deceit. So far as damages for misdescription are concerned, it is irrelevant, for present purposes, that the damages which could be recovered are severely limited under the rule in *Flureau* v. *Thornhill* (1776) 2 W.Bl. 1078 and *Bain* v. *Fothergill* (1874) L.R. 7 H.L. 158.
[74] [1899] 2 Ch. 710, at p. 714, reversed C.A. [1900] 2 Ch. 298 on different grounds.
[75] (1864) 10 H.L.C. 672.
[76] (1851) 1 Sim.(N.S.) 523.
[77] Also one of the two Lords who decided *Rose* v. *Watson*, *supra*.

refused, on the ground of misrepresentation, to grant a decree of specific performance to the vendor.[78] In the later case the purchaser in essence [79] claimed a lien on the land in respect of the deposit he had paid. Both Lord Westbury L.C. and Lord Cranworth seem to have thought, for reasons which are not altogether clear, that in order for the purchaser to have the lien it had to be established that he was equitable owner of the corresponding portion of the land. Lord Westbury L.C. who gave the leading speech, drew a curious distinction between the effect of the contract, which transfers the ownership of the estate in equity, *i.e.*, produces conversion, and part-payment of the purchase-money which "finally" transfers the ownership of a corresponding portion of the estate. He said [80]: "When the owner of an estate contracts with a purchaser for the immediate sale of it, the ownership of the estate is, in equity, transferred by that contract. Where the contract undoubtedly is an executory contract, in this sense, namely, that the ownership of the estate is transferred, subject to the payment of the purchase-money, every portion of the purchase-money paid in pursuance of that contract is a part performance and execution of the contract, and, to the extent of the purchase-money so paid, does, in equity, finally transfer to the purchaser the ownership of a corresponding portion of the estate."

It is not easy to comprehend the exact nature of the distinction drawn by Lord Westbury nor its significance; nor, with respect, does the existence of the lien claimed by the purchaser seem to depend upon the doctrine of conversion at all. One may, perhaps, discount *Rose* v. *Watson* [81] on the ground that the effect of misrepresentation was not considered, but on its face it appears to be a House of Lords decision rendering untenable the view that the presence of misrepresentation results in the contract being not valid. Consequently it seems that there will be conversion in such case,

[78] This decision is itself not without difficulty, for the misrepresentation relied on was of an intention to do certain acts in the future not amounting to a promise to do them, which was not fulfilled. It must accordingly be doubtful whether the case was rightly decided, as it seems impossible satisfactorily to reconcile it with decisions such as *Jorden* v. *Money* (1854) 5 H.L.C. 185, which are generally regarded as establishing that the misrepresentation relied on must be as to a matter of fact. It could not be established in *Myers* v. *Watson* that the vendor did not have the alleged intention when the contract was entered into, so as to bring into play the familiar phrase "the state of a man's mind is as much a fact as the state of his digestion" (*per* Bowen L.J. in *Edgington* v. *Fitzmaurice* (1885) 29 Ch.D. 459, at p. 483). No comment was made on this aspect of the matter in *Rose* v. *Watson*, *supra*.

[79] This was the substance of the matter, though the actual facts were somewhat more complex.

[80] (1864) 10 H.L.C. at p. 678. Lord Cranworth appears to have thought that conversion under a contract of sale only takes place when the purchase-money is paid—S.C. p. 683.

[81] *Supra*.

and apparently the position is unaltered by the fact that a specific performance action has failed.[82] However, *Rose* v. *Watson*[83] might possibly be distinguished in any case which did not concern the existence of a purchaser's lien, and be treated as binding authority only on that particular point. It certainly seems doubtful whether it would have been held that there was conversion in *Rose* v. *Watson*[84] if the question had arisen on the death of the purchaser in connection with a dispute between the persons respectively entitled to his real and personal estate. In fact, the purchasers had died and the respondent Watson filed his bill as their legal personal representative, but there does not appear to have been any contest between the persons entitled to their real and personal estates. Contrary to the decision in the case, the fact that the bill was filed by the personal representative seems rather to imply that the assumption was that there was no conversion.

As to laches, we have seen that if on the death of either the vendor or the purchaser there is conversion so far as persons claiming in his estate are concerned, this will be unaffected by laches thereafter.[85] There is no authority for other cases, such as where a valid contract is entered into which becomes unenforceable by specific performance by reason of the laches of one of the parties thereto. Suppose, for instance, that the vendor is guilty of laches, and that the purchaser subsequently dies, the question might arise in the administration of his estate whether or not he was to be regarded in equity as the owner of the property. Probably in such cases there has ceased to be a valid contract and accordingly there would be no conversion.

Valid Contract or Specific Performance

In this concluding section, I propose to consider whether any general principles can be deduced from the cases which will help one to ascertain whether a contract for the sale of land, in any particular circumstances, results in conversion. The matter is somewhat complicated by the fact that the critical point of time may differ according to the context so that, as we have seen, the personal representatives of a vendor may have to treat the property as converted *vis-à-vis* the purchaser, but as not converted *vis-à-vis* the beneficiaries. Again, if by any chance the same persons should

[82] In the law and terminology of contract the effect of misrepresentation in such case is to make the contract voidable, *i.e.*, valid at first but avoided by the unsuccessful specific performance action.

[83] *Supra.*

[84] *Supra.*

[85] *Whittaker* v. *Whittaker* (1792) 4 Bro.C.C. 31; *Curre* v. *Bowyer* (1818) 5 Beav 6n.

be the personal representatives of both the vendor and the purchaser, they may have to treat the property as converted in the administration of one estate, but as unconverted in the administration of the other. It may further be observed at this point that in the adminstration of the estate of a deceased vendor or purchaser one has to consider the facts as at the date of the death, and what happens thereafter is irrelevant. As between vendor and purchaser, however, it seems that the point is more fluid. The initial contract may not be a valid one, by reason, for instance, of a defect in title, so that there is no conversion.[86] Acceptance of the title by the purchaser may subsequently make the contract a valid one and result in conversion,[87] while subsequent abandonment of the contract by mutual agreement, or rescission by one party under a provision of the contract, would presumably nullify the conversion which had taken place. It may well be, indeed, that it is wrong to seek any test which can be applied generally, and that one should use differing criteria according to the type of case with which one is concerned. Thus it might possibly be contended that in the administration of the estate of a deceased vendor or purchaser there will be conversion if, at the moment of death, a decree of specific performance could have been obtained against him, though this test is hardly applicable in cases arising between vendor and purchaser, and cannot explain and is inconsistent with the decisions in *Rose* v. *Watson*[88] and *Gordon Hill Trust* v. *Segall*.[89] It is not, however, very satisfactory to have different rules for different cases, and it seems worth while, therefore, to consider whether any general principles can be found.

The two possible criteria which have emerged from the preceding discussion are those of valid contract and specific performance. It might be thought that a valid contract for this purpose could be defined in terms of the availability of the remedy of specific performance. Dicta of Jessel M.R. in *Lysaght* v. *Edwards*[90] and Fry L.J. in *Edwards* v. *West*[91] do, perhaps, lend some support to the view that a valid contract is one which enables[92] both parties thereto to claim specific performance, but it seems impossible to maintain this view in face of cases such as *Hudson* v. *Cook*,[93] *Rose* v. *Watson*[94] and *Gordon Hill Trust* v.

[86] But see n. 33, *supra*.
[87] *Quaere* whether this is retrospective: see discussion, *supra*.
[88] (1864) 10 H.L.C. 672.
[89] [1941] 2 All E.R. 379.
[90] (1876) 2 Ch.D. 499.
[91] (1878) 7 Ch.D. 858.
[92] Technically, of course, the remedy of specific performance is always discretionary.
[93] (1872) 13 Eq. 417.
[94] *Supra*.

Segall[95] where there was held to be conversion notwithstanding the fact that specific performance was not available to both parties. Availability of the remedy to one party is clearly not enough to constitute a valid contract for present purposes.

In the light of the numerous cases where the question of conversion has been held to depend upon the existence of a valid contract, the availability of the remedy of specific performance would not seem to be by itself a sufficient criterion nor, for the reasons just discussed, is it possible to reach this result by indirect means, i.e., by relating the validity of the contract to the availability of specific performance. In any case, although a test based on the availability of specific performance to the other party might reach the right result in cases arising on the death of the vendor or purchaser,[96] it has been pointed out that it is not appropriate or accurate when applied to other types of case. One might, therefore, think that in deciding whether a contract results in conversion it is necessary to proceed in two stages: first, to ascertain whether or not there is a valid contract: if not, there is no conversion and no need to inquire further; secondly, if there is a valid contract to consider the availability of the remedy of specific performance. Where specific performance is available to both parties, there would clearly be conversion. Otherwise, where the question arises in the estate of the vendor or the purchaser, and where only one party is in a position to obtain specific performance, perhaps the better view would be that there is conversion in his estate if he is bound, but no conversion if he is not. In other circumstances, however, as we have seen, the availability of specific performance seems to make no difference.[97] It is accordingly doubtful how far the availability of specific performance can be regarded as a criterion, and, as a criterion, it suffers from the defect that, being a discretionary remedy, it is only after proceedings before the court that it is possible to say with certainty whether the remedy is available or not.[98]

In the light of what has been said it is tempting to argue that whether or not there is conversion depends solely upon the question whether or not there is a valid contract, a question which was discussed in an earlier part of this article independently of the availability or otherwise of the remedy of specific performance. If there is a valid contract, conversion, on this view, flows from the

[95] *Supra.*

[96] Such a test would not always work, unless subjected to certain qualification: see, *e.g.*, *Re Thomas* (1886) 34 Ch.D. 166 discussed *supra.*

[97] See, *e.g.*, *Rose* v. *Watson*, *supra*, and *Gordon Hill Trust* v. *Segall*, *supra.*

[98] Too much stress should not be laid upon this, for, since the discretion is a judicial discretion, it is exercised in accordance with well-established rules.

maxim " equity looks upon that as done which ought to be done "; which, it will be submitted, is not necessarily conterminous with the remedy of specific performance.

On examination, there do not appear to be any decisions directly and necessarily based on the availability or non-availability of the remedy of specific performance. The main matters which have been dealt with which may effect the availability of specific performance are misdescription, including defect of title, absence of writing to satisfy section 40 of the Law of Property Act, 1925, the presence of a power of rescission in the contract itself, and precedent defects such as misrepresentation. It will be convenient to consider each of these matters in turn.

(1) As to misdescription, it will be recalled that the effect is to make the contract not a valid one, and it is for this reason that there is no conversion.

(2) As to section 40 of the Law of Property Act, 1925, this does not generally affect the validity of a contract but only its enforceability, yet, as we have seen, on the death of a party who is not bound by reason of the statute, there is no conversion in his estate. It is submitted, however, that there is no need to bring in the non-availability of the remedy of specific performance as the reason for this, and that it is better to rely directly on the statute, for it seems clear to claim that the doctrine of conversion applied in such case would be to rely on and enforce the contract contrary to the express provisions of section 40. The language of Grant M.R. in *Buckmaster* v. *Harrop*[99] may, perhaps, cause some difficulty, but one is, perhaps, entitled to explain such a relatively early case in the light of later decisions stressing the need for there to be a valid contract. It will also be recalled that in the section on specific performance it was submitted that on the death of a party who has signed the necessary writing (the other party not having so signed) there would be conversion, which is consistent with the view expressed above with regard to the effect of section 40,[1] and does not necessarily depend on the fact that a specific performance action may lie.

(3) As to the existence of a power of rescission, this, it was submitted, on the basis of the Court of Appeal decision in *Gordon Hill Trust* v. *Segall*,[2] does not affect the validity of the contract or the operation of the doctrine of conversion, though it may affect the availability of the remedy of specific performance.

[99] (1802) 7 Ves. 341.

[1] Should the view taken above be wrong, then one would be bound to say that in this context the absence of the necessary writing prevents a contract from being a valid one.

[2] [1941] 2 All E.R. 379.

(4) As to other matters such as misrepresentation it was suggested that on principle, and apart from the decision in *Rose* v. *Watson*,[3] one would expect the effect to be the same as the effect of misdescription, *i.e.*, no valid contract and no conversion. *Rose* v. *Watson*,[4] however, apparently decides that the presence of misrepresentation does not prevent the contract from being a valid one. The case does not, however, in any way contradict the view now being put forward, for *Rose* v. *Watson* [5] went on to hold that there was conversion, though neither party was in a position to claim specific performance.

Actual decisions do not, accordingly, seem to be inconsistent with the view that in deciding whether or not there is conversion the only question is whether there is a valid contract, the availability of the remedy of specific performance being irrelevant. In these circumstances one may, perhaps, be rather more bold in the face of contrary dicta.

Perhaps the leading judicial statement in favour of the availability of specific performance as a criterion for conversion is that of Lord Westbury L.C. already cited.[6] It might be contended that the reference in that case, which did not concern a contract for sale of land, to the contract being one of which a court of equity would decree specific performance, was not a reference to the particular circumstances of the particular contract in question, but merely meant that the contract must be of such a kind, *e.g.*, a contract for the sale of land, as could be the subject of such a decree. More important, perhaps, is the explanation of this dictum given by Lord Macnaghten in *Tailby* v. *Official Receiver*.[7] This case was concerned, as was *Holroyd* v. *Marshall*,[8] with the equitable assignment of future property. It is submitted that there is a close and pertinent analogy. Such an assignment is treated in equity as a contract to assign when the property comes into the possession of the assignor, and the moment that happens the assignee becomes the equitable owner or acquires an equitable charge while the assignor retains the legal title. It had been argued, and Lord Westbury's judgment was cited in support of this view, that this separation of the legal and equitable titles, which is somewhat similar to the effect of conversion on a contract for sale of land, depended upon the availability of the remedy of specific performance. Lord Macnaghten, however made it clear

[3] (1864) 10 H.L.C. 672.
[4] *Supra.*
[5] *Supra.*
[6] In *Holroyd* v. *Marshall* (1862) 10 H.L.C. 191, *supra*, p. 55. It is difficult to reconcile this statement of Lord Westbury's with his own decision in *Rose* v. *Watson*, *supra.*
[7] (1888) 13 App.Cas. 523.
[8] *Supra.*

that there can be an equitable assignment even though specific performance is not available, a proposition which had, indeed, been established long before in *Metcalfe* v. *Archbishop of York*.[9] It does not seem material for present purposes that according to some statements of the law [10] it is only where valuable consideration has actually been paid, *i.e.*, where the consideration is executed as opposed to executory, that the equitable assignment will be effective. The dicta to this effect are weighty, but it seems difficult to accept on principle—as Atkin L.J. has observed [11]: "I fail to see how the payment of the price can convert that which was not an equitable assignment before the payment, into an equitable assignment after the payment." Further Sargant L.J. in his strong dissenting judgment in *Re Wait* [12] took the view that there had been a valid equitable assignment although £750 was still due to be paid under the contract.

Perhaps the main other judicial statement which causes difficulty is that in *Howard* v. *Miller*,[13] previously cited. This is less easy to explain, but technically it is not binding as it is a Privy Council case. It may also be observed that there appears to have been no argument upon this point and the statement cited is in any case an *obiter dictum*. Nevertheless the view that the availability or otherwise of the remedy of specific performance is irrelevant to the question whether a contract for the sale of land has resulted in conversion is not put forward without some hesitation. The truth of the matter seems to be that the courts have been extremely empirical in their approach to these cases, and there is insufficient material for confident generalisation. As suggested above it may be that there is no general rule and that different types of case have to be treated differently. The writer will be content if he has succeeded in bringing out some of the latent problems in what is, perhaps, not infrequently regarded as a well-known field, and in suggesting some of the more important considerations involved in finding consistent and satisfactory solutions to them.

[9] (1836) 1 My. & Cr. 547. See also *Re Lind* [1915] 2 Ch. 345.
[10] *Per* Lord Macnaghten (1888) 13 App.Cas. at p. 547; Swinfen-Eady L.J. in *Re Lind* [1915] 2 Ch. at p. 360.
[11] In *Re Wait* [1927] 1 Ch. 606, at p. 638.
[12] *Ibid.*, at p. 652.
[13] [1915] A.C. 318, *supra*, p. 55.

NOTES OF RECENT CASES

1. *REAL PROPERTY AND CONVEYANCING*

By F. R. Crane, ll.b., Solicitor

Re St. Swithin's, Norwich [1959] 3 W.L.R. 989; [1959] 3 All E.R. 301. (Norwich Consistory Court)

Ecclesiastical law—faculty to grant option—jurisdiction of consistory court—powers of incumbent—Settled Land Act, 1925, s. 29; Charitable Trusts Amendment Act, 1855, s. 29.—The rector and churchwardens of the parish of St. Swithin, Norwich, petitioned for a faculty permitting the rector (in whom the freehold was vested) to give the Westminster Bank, Ltd., an option to take a lease of the church in certain special circumstances which were not disclosed. St. Swithin's church, not used since 1939, was described as "redundant and superfluous to present or future foreseeable pastoral requirements." J. H. Ellison Ch., though desirous of granting the faculty, held he had no power to do so, despite "novel and far-reaching" arguments.

The first argument was that the Settled Land Act, 1925, giving to the trustees of land held on charitable ecclesiastical or public trusts all the powers of the Act, including that of granting options (s. 51), authorised the transaction. Here the learned Chancellor held, simply, that section 29 could not have been intended to apply to consecrated buildings or land, so as to enable incumbents to dispose of churches—*reductio ad absurdum* being achieved when counsel was forced to admit that the argument led directly to the proposition that the dean and chapter could sell Norwich Cathedral. The learned Chancellor reinforced his general view by pointing out, first, that the Settled Land Act, s. 29 (3), making certain consents necessary, did not mention the ecclesiastical authorities, and second, that the exclusion of university lands by section 29 (6) was amply explained by the existence of the Universities and College Estates Act, 1925. Such exclusion did not imply the inclusion of consecrated land; there is, in fact, no maxim *exclusio unius, inclusio alterius,* in this context.

The second argument was that the consistory court could approve the disposal of the church under the Charitable Trusts Amendment Act, 1855, s. 29. Here Ellison Ch. held that the competent courts were either the Chancery Division of the High Court, or a court specially mentioned in the Charitable Trusts Act, 1853, but not an ecclesiastical court.

The learned Chancellor remarked that some simple means of disposing of unwanted churches is needed. It may be added that a method does exist under the Union of Benefices Measures, 1923 to 1936, and the Union of Benefices (Disused Churches) Measure, 1952, as to which see Halsbury's *Laws of England* (3rd ed.), Vol. 13, at pp. 391, 392, where the procedure, which is complicated, is set out.

Re Caunter's Charge. Bishop v. *Southgate Corporation* [1959] 3 W.L.R. 822; [1959] 3 All E.R. 669 (Ch.D.)

Small dwelling—advance by local authority—realisation of security—duty with regard to surplus moneys—Small Dwellings Acquisition Act, 1899, ss. 5, 6.—The Small Dwellings Acquisition Act, 1899, empowers local authorities to advance moneys for house purchase. If a borrower defaults in repayment the authority may (s. 3 (3)) either (i) take possession and then manage or sell the house as they think fit (s. 5) or (ii) may try to sell by auction without taking possession (s. 6 (1)) and if such sale is unsuccessful may then obtain possession (s. 6 (2)). If the procedure under section 5 is followed the authority must pay to the proprietor the difference between the value of the house and the value of the loan, interest and costs (s. 5 (3) (4)). Likewise if there is a sale under section 6 (1) any balance after discharge of the loan, etc., must be paid to the proprietor. But section 6 (2) expressly provides that no sum shall be paid to the proprietor where possession is taken after an abortive sale. Presumably the legislature in 1899 assumed that in such circumstances there would not be any balance, by value or cash, to pay. However, in post-1945 conditions an abortive sale by auction under section 6 (1) may be followed by a good sale by private treaty after possession has been obtained under section 6 (2). In *Re Brown's Mortgage, Wallasey Corporation* v. *Att.-Gen.* [1945] Ch. 166 Cohen J. (as he then was) held that in such a case the local authority, as trustee for the ratepayers, had no power to make any payment to the proprietor.

The same problem now came before Danckwerts J. except that the recipient of the payment (if any) would not be the defaulting borrower but a second mortgagee (actually the vendor to the borrower). The learned judge remarked that the result reached in *Re Brown's Mortgage, supra,* seemed very unfair and deprived the mortgagor of the traditional protection of equity, declined to follow the earlier decision, and held the local authority accountable to the second mortgagee.

The basis of the distinction of *Re Brown's Mortgage, supra,* was that the Act of 1899 contemplated a chargee and a proprietor as different persons, and that the former was not specifically covered by section 6 (2). Nevertheless the two cases do conflict in principle and a clarifying decision from a higher court would be welcome.

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2. *TRUSTS*

By F. R. Crane, ll.b., Solicitor

Grey v. *Inland Revenue Commissioners* [1959] 3 W.L.R. 759; [1959] 3 All E.R. 603 (H.L.)

Trusts of equitable interests in personalty—directions to trustees —whether writing required—construction of statutes—Law of Property Act, 1925, s. 53 (1) (c).—The House of Lords (Viscount

Simonds, Lord Reid, Lord Radcliffe, Lord Cohen and Lord Keith of Avonholm) has briefly affirmed the decision of the Court of Appeal (noted *ante*, Vol. 22 at p. 301). It will be recalled that A transferred shares to trustees to hold on his behalf, then orally directed them to be held for his grandchildren and subsequently executed a confirmatory declaration. The question was whether the oral direction was a "disposition" within section 53 (1) (*c*) of the Law of Property Act, 1925; if it was, then it was void for want of writing and stamp duty was exigible on the subsequent written declaration. Upjohn J. in the court of first instance and Evershed M.R., dissenting in the Court of Appeal, held the oral declaration equivalent to a declaration of trust rather than an assignment, but Morris and Ormerod L.JJ. thought the word "disposition" covered the transaction. Much discussion concerning the nature of dispositions of equitable interests took place.

The House of Lords has been able to by-pass these interesting problems. The premise on which Upjohn J. and Evershed M.R. relied was that the word "disposition" in the Law of Property Act, 1925, s. 53 (1) (*c*), had a limited meaning because that section replaced the Statute of Frauds, 1677, s. 9, which referred to grants and assignments. But the House of Lords has now pointed out that the Law of Property Act, 1925, though a consolidating Act directly, replaced, not the Statute of Frauds, but the Law of Property Act, 1922, and the Law of Property (Amendment) Act, 1924, which were avowedly amendment Acts. Consequently there was nothing in the rules of statutory interpretation to prevent the word "disposition" being given a normal wide connotation. Therefore the verbal direction was invalid.

The consequence seems to be that if an equitable interest is "got rid of" (words used in the Court of Appeal) by a person not at the time entitled to a legal estate, there is a "disposition" and writing is required. Whether there be assignment, direction to trustees or declaration of trust (see *ante*, Vol. 22 at p. 142, and cases there cited) the beneficial interest will pass so as to attract section 53 (1) (*c*). A declaration of trust of personalty by the legal owner thereof can now be made verbally, and, perhaps, a contract to assign an equitable interest (see next note).

Oughtred v. *Inland Revenue Commissioners* [1959] 3 W.L.R. 898; [1959] 3 All E.R. 623 (H.L.)

Trusts of equitable interests in personalty—agreement to convey beneficial interest—effect—Law of Property Act, 1925, s. 53 (1), (2). —The House of Lords (Lords Radcliffe, Cohen, Keith of Avonholm, Denning and Jenkins) has by a majority of three to two affirmed the unanimous decision of the Court of Appeal (noted *ante*, Vol. 22, p. 301), whereby the original decision of Upjohn J. (noted *ante*, Vol. 22, p. 141) was reversed.

The facts were, briefly, that A, life-tenant of a trust fund consisting of shares, and B, the reversioner, agreed orally that A should transfer other free shares to B, and B give up his reversionary

interest to her. This oral agreement was followed by three documents—transfer of the free shares by A to B, a release by A and B to the trustees, and a transfer of the settled shares by the trustees to A. Stamp duty was claimed on the latter document.

The general trust question was whether an agreement for value to transfer an equitable interest operated as an assignment, and if so, whether it was a disposition requiring writing under the Law of Property Act, 1925, s. 53 (1) (*c*). Upjohn J. held the agreement created a constructive trust, exempt from the requirement of writing by section 53 (2) of the Law of Property Act, and that thereupon the equitable interest passed (see too *Timpson's Executors* v. *Yerbury* [1956] 1 K.B. 645). The Court of Appeal did not accept this reasoning but found the point unnecessary of decision because they regarded the transaction as an agreement for sale followed by transfer in the usual way.

The majority of the House of Lords (Lord Jenkins, Lord Keith of Avonholm and Lord Denning) have now taken the same view. Consequently they did not have to decide whether or not the oral agreement operated to pass the equitable reversionary interest. Lord Jenkins, with whom Lord Keith concurred, was content to assume in the appellants' favour that section 53 (1) (*c*) did not apply; Lord Denning, however, added that he thought section 53 (1) (*c*) did make the oral agreement ineffective. Lord Radcliffe, dissenting, accepted the view of Upjohn J. set out *supra*. Lord Cohen, also dissenting, thought the reversioner became a constructive trustee but (apparently) that there was no assignment of the equitable interest either by the agreement or by the subsequent transfer so no duty was payable; nevertheless the reversioner was estopped from disputing the life-tenant's title to the settled shares.

In the end, then, this case, after being strenuously fought in all three courts, has failed to answer the two short questions: (i) does an agreement to transfer an equitable interest *ipso facto* pass the equitable interest, and (ii) if so, does it operate as a disposition under section 53 (1) (*c*) of the Law of Property Act, or as a constructive trust under section 53 (2)? One must not cavil at this result, because of course these questions were not directly in issue, on the view that ultimately prevailed. One might have sighed for some *obiter dicta* but for the unmistakable indications that such dicta would have been conflicting. The operation of, and formality required for, an agreement to convey an equitable interest is therefore still an open question.

Re Allen's Settlement [1960] 1 W.L.R. 6; [1959] 3 All E.R. 673 (Ch.D.)

Trusts—variation of investment clause—evidence needed—Variation of Trusts Act, 1958.—On this summons under the Variation of Trusts Act, 1958, for extension of powers of investment to enable investment to be made in ordinary shares, Vaisey J. directed that in future cases it would not be necessary to adduce expert evidence containing the general argument for such extension, whether the

application be made by private or charitable trustees. Evidence of matters peculiar to the particular trust could still be brought.

The court has, therefore, in effect taken judicial notice of the state of the stock market, and so simplified and cheapened applications of this nature. The Government now proposes to extend the statutory powers of investment, so these applications will eventually become unnecessary.

Re Moritz, deceased; Midland Bank Executor and Trustee Co. v. *Forbes and others* [1959] 3 W.L.R. 939; [1959] 3 All E.R. 767 (Ch.D.)

Trustees—application for directions whether to commence proceeding—whether prospective defendants entitled to copies of exhibits or to be heard—practice.—The Midland Bank, as trustee, asked, *inter alia,* whether proceedings should be brought against two defendants who were also beneficiaries, swearing in support an affidavit to which there were a number of exhibits. The two defendants now asked for copies of the exhibits and the right to be heard on the application for directions. Wynn-Parry J. refused both requests, stating that to accede to them would be contrary to the established practice of the Chancery Division, whereby such applications are dealt with in chambers without the presence of the prospective defendants. He added that limited leave to proceed only might be given, so that the court could reconsider the matter at a later stage of, *e.g.,* discovery. *Re Kay's Settlement* [1939] Ch. 239 was distinguished as, in effect, a case depending on the law, the evidence being undisputed.

Re Clitheroe's Settlement Trusts [1959] 1 W.L.R. 1159; [1959] 3 All E.R. 789 (Ch.D.)

Variation of trusts—exclusion of wife of settlor—object to avoid tax—Variation of Trusts Act, 1958.—The *Clitheroe* settlement gave the trustees power to distribute income or capital among a specified class, including the settlor's present or any future wife, provided that the capital was not reduced below £100. The settlor and his present wife had assigned all their interest under the settlement but a future wife might still benefit. Hereby a liability to tax might arise, having regard to the Finance Act, 1958, ss. 21, 22, reversing *Inland Revenue Commissioners* v. *Saunders* [1958] A.C. 285. It was desired to vary the settlement by clearly excluding the settlor and any wife of his from benefit, by removing their power to appoint new trustees, and by substituting a covenant by the settlor to pay, via trustees, £100 per annum to any such future wife.

Danckwerts J. opened his judgment by saying that he had examined the matter "somewhat closely and critically" because the whole object was to save tax; later he said that the reversal by statute of the decision in *Inland Revenue Commissioners* v. *Saunders, supra,* meant that "there is something to be said for the taxpayer in the

present case, which would not otherwise have enabled me to regard this application favourably." The learned judge also referred to approval given to a similar application by Vaisey J. in *Re Roberts' Settlement Trusts*, reported only in *The Times* newspaper of February 27, 1959. He then held the provisions to be for the benefit of both infant beneficiaries within the specified class and for the benefit of any future spouse of the settlor, subject to evidence being filed to show the value of the settlement funds and the ability of the settlor to honour the covenant to pay £100 p.a.

This case is an obvious example of the "game of chess" between taxpayer and Revenue. Yet, with respect, it is not clear why this particular move should have required special scrutiny and the justification of being a defence to a recent attack, when other applications to save tax have gone through without question (notably that in *Re Chapman's Settlement Trusts* [1959] 1 W.L.R. 372, reversing the effect of *Chapman* v. *Chapman* [1954] A.C. 429). It is respectfully submitted that the courts can hardly attempt to distinguish between tax-saving schemes; if the result clearly does bring financial benefit to the beneficiaries, without prejudicing anyone, the court has jurisdiction to approve and must surely exercise its discretion so to do.

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3. *CHARITIES*

By A. Kiralfy, Barrister-at-Law

Re Endacott [1959] 3 W.L.R. 799; [1959] 3 All E.R. 562

Public non-charitable purpose—uncertainty.—Object trusts run the double gauntlet of perpetuity and uncertainty. If conceded a strictly charitable nature they may escape both; if they are sufficiently precise and involve an immediate expenditure they will escape the operation of the perpetuity rule. On the other hand the settlor is not considered to have created a valid trust if there is no real precision as to objects, even if a fixed amount of money or property is given for such objects. Nor will the courts allow them to be construed as powers of appointment if framed in the form of a gift or trust. The result may seem unduly harsh. Of course the testator or settlor may exclude any enforceable obligation and give property as a gift with a mere suggestion as to its means of application. This is therefore a problem for the draftsman in the first instance. The court seems to regard difficulty of supervision as a reason for refusing to recognise a purpose or object trust. In the instant case residue was left to the X parish council "for the purpose of providing some useful memorial to myself." It was held that a trust was intended, and not a mere wish. It was also held that parish councils had non-charitable activities and could accept gifts for these without acting *ultra vires*. In this connection the cases of gifts to holders of ecclesiastical offices were distinguished, since the advancement of religion is in itself a charitable object and such office-holders are circumscribed in the use

to which they may devote the property they receive in that character. Had the testator directed the erection of a memorial of a religious character his direction would, though not charitable, have been sufficiently certain (*Hoare* v. *Osborne* (1866) 1 Eq. 585, and the unreported case of *Re Catherall* in 1958). The Court of Appeal in the instant case refused to extend the cases of gifts for animals or tombs, which they considered inveterate but probably wrongly decided. With respect, it is difficult to see why an outright gift for a useful work should fail, since the court should be able to judge whether a proposed work is "useful" or not. Courts today are often required to pass on the "public interest" of a trade practice or the "utility" of a patent, and would not be expected to decide whether a project was the most useful which could be devised, but merely whether it was useful to the community. Of course in the animal and tomb cases the objects were more clearly defined.

(*Theobald* 118, 349)

Royal College of Nursing v. *St. Marylebone Borough Council*
[1959] 1 W.L.R. 1077; [1959] 3 All E.R. 663

Charity—rating.—The Court of Appeal have upheld the decision of the Divisional Court, to the effect that the College exists to improve nursing service to patients and not to advance the professional interests of nurses. The protection of public health is now a well-established case of charity.

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4. *WILLS*

By A. Kiralfy, Barrister-at-Law

Re Krawitz Will Trusts [1959] 1 W.L.R. 1192;
[1959] 3 All E.R. 793

Will—construction—survivorship—date of distribution—Administration of Estates Act, 1925, s. 50 (1).—Vaisey J. had here to decide a case bristling with equitable problems. He was able to strike out a condition subsequent if the legatee married anyone who did not practice the Jewish faith, on the authority of the well-known decisions of the House of Lords, *e.g.*, *Clayton* v. *Ramsden* [1943] A.C. 320. He was also able to exclude the application of the rule in *Hancock* v. *Watson* [1902] A.C. 14 to a failure of a gift over, since, although the classic situation of an absolute gift followed by a reduction of interest existed, there was a specific provision for the fate of the property, which excluded the rule. A gift of property in a will executed in 1947 was made to a daughter of the testator, but, if she died without issue, as was the case, it was given over to such of the "next-of-kin according to the Statute of Distribution" (a phrase

somewhat inappropriate in a will drawn up in modern times) as should be living in the United Kingdom at the time of the daughter's death. Vaisey J. had to decide at what date the class of next-of-kin closed, and what their respective claims were. Section 50 (1) of the Administration of Estates Act, 1925, provides that references to next-of-kin in the above form must be read, in a modern will, as references to appropriate claimants under the modern intestacy law (*cf. Re Gilligan* [1950] P. 32). He referred to the general rule that the class closes at the death of the testator (*Re Winn* [1910] 1 Ch. 278) but held that it was excluded in the instant case, and that the words of survivorship did not merely refer to members of the class surviving each other but also surviving the daughter. In fact the daughter survived the testator but not his widow. In the result the daughter's estate was excluded. As between the widow and the other children of the marriage the learned judge held that they took as members of a class equally, and that the widow did not take the same preferential rights which she enjoys under the intestacy laws, such laws here fixing the members of the class but not governing their shares. This general rule was confirmed by the wording of the gift over. The judgment is very short on this point but the reasoning seems to have been that the testator is deemed to know that in law his widow might take all his property if a small estate (the report does not state its value) and his reference to next-of-kin living in the United Kingdom suggested that he was referring to a plural class, some of whom might be living here and others not, and not to a singular person, the widow. Finally, it was held that the widow and children took as joint tenants, since there were no words of severance.

(*Theobald* 324, 325, 403)

Re Douglas's Will Trusts, Lloyd's Bank v. *Nelson*
[1959] 1 W.L.R. 1212; [1959] 3 All E.R. 785

Will—construction—survivorship—joint and common interests.— Residue was left by a testator, after a life interest to his widow, to his three sisters or the survivors or survivor of them. All three survived the testator but predeceased the widow. The Court of Appeal held that the three sisters took jointly and that the references to survivorship were therefore unnecessary if they referred to their surviving each other in view of the usual *jus accrescendi*. They therefore held that the reference must be to surviving the widow. If none survived the period of distribution there was no reason why the estate of one sister should be preferred to that of another, and the property passed as on intestacy. The rule in *Cripps* v. *Wolcott* (1819) 4 Madd. 11 was applied. On the other hand, had the initial gifts been in common the reference to survivors might be interpreted as referring to their surviving each other and not to surviving to the date of distribution (*Browne* v. *Lord Kenyon* (1818) 3 Madd. 410). Logical enough, these distinctions appear to put a heavy burden on the draftsman, and a fuller account of what is to happen in various events seems a preferable solution for him than a resort to such refinements in later litigation.

(*Theobald* 576, 577)

Re Cohen [1959] 3 W.L.R. 916; [1959] 3 All E.R. 740

Administration of assets—adjustment—marshalling—Administration of Estates Act, 1925, s. 35.—This is an important but rather disturbing case, involving two issues. It was the object of the old Real Estate Charges Acts to make all property prima facie bear its own charges, so that the devisee of a mortgaged property took the same value which the testator had, namely the equity of the property only, and could no longer call on residue to pay off the charge. The times are long since past when mortgages were temporary advances, and most properties today are purchased through loans by mortgagees, and these are often left on by owners who could afford to pay them off but do not. It seems unreasonable to expect the devisee to be treated differently at the expense of residuary personalty. Some lawyers fail to apply section 35 of the Administration of Estates Act or use it grudgingly, and the present case will tend to confirm them in this. In it the testator devised two freehold houses in Brighton to daughters Edith and Lily respectively. A residuary gift to the widow included six other houses, as well as other assets. Jessel M.R. had clearly held, in *Sackville* v. *Smyth* (1873) L.R. 17 Eq. 153, that the fact that a house was specifically devised did not show a contrary intention so as to exclude what is now section 35. Indeed it is so usual to refer to land and houses specifically in wills that any other solution would seem to make the legislation nugatory. Lord Evershed M.R. in *Re Cole* [1958] Ch. 877 referred to *Sackville* v. *Smyth* and another similar case of *Re Smith* (1886) 33 Ch. D. 195, with approval. The two older cases were not cited in *Re Biss* [1956] Ch. 243, where the court held that a specific devise was a contrary intention. Danckwerts J. in the present case preferred to follow *Re Biss* and leave it to the Court of Appeal to decide the matter, though why the litigant should be put to such expense is not obvious. The other point turned out well in the end. The personal representatives had used the proceeds of sale of several of the houses left by residuary devise and redevised by the widow in order to pay off the mortgages, and treated this as destroying those devises. The learned judge held that equity required an adjustment by which ultimately the debts would be treated as paid rateably out of all the properties liable to the debts, at their probate values. That the probate valuation and not the actual proceeds of sale was the right basis was taken from *Re John* [1933] Ch. 370, where the "value to the testator" was made the test, a point that might well have supported a refusal to follow *Re Biss* in the other part of the case. Danckwerts J. treated the argument on the adjustment with patience and great consideration, and was able to resolve it by a reference to *Tombs* v. *Roch* (1846) 2 Collyer 490, in which it was pointed out, *inter alia*, that a testator "intends that the payment of his debts shall be as far as possible so arranged as not to disappoint any of the gifts made by it, unless the instrument discloses a contrary intention." Indeed the case might be supported by the analogy of marshalling, the personal representative having resorted to one or more of several assets equally liable. But it seems self-evident, on a moment's reflection, that the adjustment of ultimate rights among beneficiaries does not depend on the accidents of administration but on legal principle. It may well

happen that an executor, pressed to pay debts of the estate, will have to sell a vacant house to do so, because other assets, *e.g.*, copyright or shares, are not very marketable. Unfortunately the books on the subject do talk as if the order of application of assets in payment of debts describes the actual history of an administration, whereas it refers to adjustments afterwards. It is somewhat terrifying to think that a personal representative, in this case a bank, imagined it could adeem devises or exercise some imagined right of preference among devises because of steps it had taken for convenient administration. The analogy of such rules of trust accounting as *Howe* v. *Lord Dartmouth* point the way. The case raised a third but minor issue. The original residuary devisee took as beneficiary under a trust for sale of residue and yet had purported to redevise the realty specifically. The learned judge pointed out that she could not technically do so, but that the equities were unaffected by this. Since she was sole beneficiary absolutely entitled, it might well have been added that she had the right to take the property unconverted, and it seems arguable that these devises had that effect.

(*Theobald* 700, 702, 706)

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5. *LANDLORD AND TENANT CASES*

By D. Macintyre, m.a., Barrister-at-Law

Gladstone v. *Bower* [1959] 3 W.L.R. 815; [1959] 3 All E.R. (Q.B.D.)

Agricultural Holdings Act, 1948—security of tenure—letting for fixed term of eighteen months—whether letting for an interest less than a tenancy from year to year.—Diplock J. held in this case that a letting of "agricultural land" for a fixed term of eighteen months is not a letting "for an interest less than a tenancy from year to year" within the meaning of section 2 (1) of the Agricultural Holdings Act, 1948. Nor, of course, is it a tenancy "for a term of two years and upwards," which continues as a tenancy from year to year unless terminated at the end of the term by at least one year's notice to quit (see section 3 (1)). The result is that a tenancy of this nature comes to an end automatically by effluxion of time, and the tenant has no security of tenure.

It was argued on behalf of the tenant that, even though a tenancy for eighteen months clearly does not create an interest which is less than a tenancy from year to year at common law, yet a letting of agricultural land for any fixed period of less than two years does have this effect, since a tenancy from year to year of agricultural land cannot, by virtue of section 23 (1) of the Act, be determined before the end of the second year, so that it must continue for at least two years. It was held, however, that the expression "tenancy from year to year" in section 2 (1) must mean a tenancy which has invariable characteristics, namely the invariable (and well-known)

characteristics common to all tenancies from year to year at common law. The operation of section 23 (1) is not confined to tenancies from year to year: it applies to all tenancies terminable by notice to quit. Nor, as its provisos show, does it apply to all tenancies from year to year or to all notices to quit under tenancies from year to year. It merely invalidates certain notices which would at common law determine a tenant's interest in agricultural land. "Tenancy from year to year" in section 2 (1) cannot, in the view of Diplock J., mean "a tenancy from year to year of agricultural land which is not terminable by notice to quit, to which the proviso to section 23 (1) of the Act applies."

An alternative defence based on Part II of the Landlord and Tenant Act, 1954, was also rejected. The tenancy in this case, even though excluded from the security of tenure provisions of the Agricultural Holdings Act, 1948, was still a tenancy of an "agricultural holding" as defined by the Act of 1948. It was therefore expressly excluded from the operation of Part II of the Act of 1954 (see section 43 (1) (*a*)).

Silvester v. *Ostrowska* [1959] 1 W.L.R. 1060; [1959] 3 All E.R. 642 (Q.B.D.)

Covenant—statutory notice of breach of covenant—allegation of breach of non-existent covenant—validity of notice—Law of Property Act, 1925, s. 146 (1)—Leasehold Property (Repairs) Act, 1938, s. 1 (1).—A lease for thirty-one years from Christmas 1931 contained a covenant by the tenant to repair and also gave the landlord a right of entry for breach of covenant, provided that, save in the case of the covenants to pay rent and to insure against fire, no breach of any covenant was to occasion a forfeiture or give a right of re-entry, unless the damages awarded for breach of such covenant and the costs of the action in which they were awarded remained unpaid for three months after judgment. In November 1956 the landlord served on the tenant a notice under section 146 (1) of the Law of Property Act, 1925, and section 1 (1) of the Leasehold Property (Repairs) Act, 1938 (as amended by the Landlord and Tenant Act, 1954), alleging breaches of the covenant to repair: and the notice was accompanied by a schedule of dilapidations, which accurately set out the breaches of covenant of which the landlord complained. But the same notice also alleged the breach of a covenant not to sub-let the premises, whereas in fact no covenant against sub-letting was contained in the lease. In an action for damages for breach of the repairing covenant it was held by an official referee that the reference in the notice to a non-existent covenant did not render the notice invalid. *Guillemard* v. *Silverstone* (1908) 99 L.T. 584 (the only other authority which deals with a notice containing references to non-existent covenants) was distinguished on the grounds that (1) it was an action for forfeiture in which a right of property was involved, and (2) the schedule of dilapidations in that case included matters referable to alleged painting covenants, which did not in

fact exist, so that the terms of the notice (which must be very carefully examined in a case where a right of property is involved) did not agree with the terms of the lease. In the present case the action was for damages only and there was nothing in the schedule to the notice which could possibly refer to breach of a covenant against sub-letting.

In reaching his conclusion the learned official referee adopted and applied a dictum of Lord Buckmaster in *Fox* v. *Jolly* [1916] 1 A.C. 1, 12 to the effect that the statute (at that time section 14 of the Conveyancing Act, 1881) provides no set form of notice, and that although a notice might be associated with useless and irrelevant matter, it would still be a valid notice under the section, if it was clear that it was so intended, and if, in fact, it contained in plain language the information the section required. He also emphasised, however, at the outset, that he was approaching the problem on the clear understanding that the action made no inroads into the rights of the tenant in her property. It was an action for damages only.

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Hudson's Building Contracts. 8th ed. By E. J. Rimmer, Q.C., and I. N. Duncan Wallace, M.A. London: Sweet & Maxwell, Ltd. lii, 504 and (index) 35 pp. (£4 4s. net.)

This new edition of a work, which stands alone as an authority in an important branch of law, has been subjected to a most thorough-going revision. The original work appeared in 1891 and the author lived to prepare four more editions over the succeeding thirty-five years. As the present editors rightly point out, the assiduity and industry which he displayed in collecting the case law on building and engineering contracts was immense. It was, however, largely the case law of the nineteenth century and its aftermath, since which time great and fundamental changes have taken place in practice. The editors have had to decide between respect for the text of an author whose authority has for so long withstood the test of time and the necessity of almost complete rewriting if the work was to be a really accurate statement of the law and practice of their subject at the present day. They have chosen the latter as their task, and they have performed it well.

Three things have contributed to changes which are not the less real because they have been so little apparent. The first is the practice at the present day of using standard forms of contract which are subject to frequent amendment. Secondly, there has been a rapid spread of the use of independent arbitrators for settling building disputes. Thirdly, the High Court has almost declined personal jurisdiction and has formed a practice of referring virtually all building cases to official referees. The result has been that while, in the last century, the courts were thoroughly familiar with disputes on the interpretation of building contracts and built up, by numerous decisions each taking account of the state of the law as evolved by those which had gone before, most subtle refinements in the construction and interpretation of such contracts, few decisions rationalising or clarifying the law are to be found in this century; possibly, as the editors point out, it may be the very unfamiliarity of the courts nowadays in construing contracts of this kind which has led to the difficulties which arise in interpreting and applying some of the modern decisions.

What, however, the editors have failed to find done for them in modern reported decisions, they have themselves done for the reader in the edition which they have prepared. Six of the eighteen chapters have been rewritten and in nine the text and, to a lesser extent, the arrangement within chapters has been radically altered. There seems to be no aspect of their subject with which the editors have not fully and drastically dealt; the changes in the practice and techniques of the building and engineering industries; the widespread adoption of standard forms of contract; standard methods of admeasurement; the "measured contract" basis of letting contracts, involving the use of bills of quantities; the making subject to the review of an arbitrator of certificates and of approval and satisfaction of an architect or engineer, hitherto held sacred; the increase in scope and importance of sub-contracting and of the use of P.C. and provisional sums; the shifting of the burden of many risks from the shoulders of the contractor to those of the employer; these and many other aspects of modern practice are discussed, rationalised and explained. The result is a harmonised and luminous exposition of the whole law of the subject, producing consistency and reason on points the previous lack of any authoritative clarification of which had tended to cause bafflement and even despair to anyone who had to advise on a case in practice.

The work, then, in its new form, is a complete guide to modern law in the construction and application of building contracts. No one faced with the task of interpreting one will find anywhere else a guide even comparable with this one in shedding light on his difficulties. If a single suggestion may be made, it would greatly help those who find themselves called upon to advise in difficult cases involving building contracts, if the less easily accessible cases referred to in the work could be collected into a companion volume. South African, Canadian and American cases, unreported cases, and even Scottish and Irish cases or cases reported only in English journals which are in the hands only of specialist readers, would form a very welcome supplement to the invaluable Volume II of the Fourth edition. This, however, is a small blemish. What the user will be most grateful for is the fact that so much information otherwise difficult to come by is collected for him at all; but for the industry, and the powers of luminous analysis, shown by the editors, the greater part of the practical knowledge, so vital to him if he is to advise on this difficult subject, might never become available to the ordinary lawyer until he hears it in a judgment against his client. With the publishing of this most admirable work, he no longer has any excuse.

C. E. S.

The Cy-près Doctrine. By L. A. Sheridan, LL.B., PH.D., and V. T. H. Delany, M.A., LL.D. Sweet & Maxwell, Ltd. xxxvi + 166 pp. (£2 10s.)

We have at last the prospect of legislation in the near future to effect the reform of the law and practice relating to charitable trusts the need for which was emphasised by the Charitable Trusts Committee under the chairmanship of Lord Nathan as long ago as 1952 and accepted by the Government in a White Paper in 1955. Just how far the legislation will bring about a relaxation of the cy-près doctrine remains to be seen: it was relaxed in the field of educational charities as long ago as 1869 and there is certainly a good case for its application in other fields of charity on less narrow lines than those on which it is at present perforce administered. But it seems safe to predict that there will be no such revolutionary move as will lessen the value of the admirable treatise which Doctor Sheridan and Doctor Delany have produced.

The Cy-près Doctrine is a work which bears the stamp of great research and scholarship. The authors' investigations have taken them far outside the jurisdiction of the English and Irish courts (where the law is largely similar), and the citation of cases on the application of the doctrine in the courts of the British Commonwealth and the United States of America is of great value. While this is not apparent from the table of contents, the book in fact falls into three parts, dealing respectively with the history of the doctrine, the substantive law relating to it, and practice and procedure. This arrangement has inevitably led to some repetition, but the arrangement of the book is so generally admirable that this is not in the circumstances a subject for criticism.

The historical chapters trace carefully the origins and development of the doctrine in England and elsewhere and in so doing provide an invaluable background to the detailed examination which the authors make of the application of it in modern times. While today cy-près inevitably conjures up the idea of charity, it seems that it belongs in origin to the law of wills, but began to be applied in the case of charitable trusts soon after the enactment of the Statute of Charitable Uses in 1601, when the court came to apply the doctrine in aid of defective execution of a power in favour of charity. But while the statute encouraged the application of the doctrine, the doctrine does not depend upon the statute, being an aspect of the inherent jurisdiction of the court to administer trusts.

Any practitioner who has had to consider the proper application of a gift for charitable purposes incapable of fulfilment will on the one hand appreciate

the value of those chapters which are concerned with the substantive law relating to cy-près and on the other hand be grateful for the guidance which they afford him; for there seems to be no facet of the problem—and it is multifarious—which has not received microscopic examination. The chapter on drafting is invaluable: a multitude of cases bear witness to the pitfalls which beset the way of the lawyer who is called upon to draft a trust for charity, and failure to appreciate some technicality may make the difference between validity and invalidity. The last two chapters deal with the exercise of the cy-près power and procedure in cy-près matters. They are concerned with the jurisdiction of the court and of the Charity Commissioners and the Minister of Education, the *rationale* of schemes and the manner in which they are settled. In practice the need to go to the court comparatively seldom arises, jurisdiction being exercisable by the Commissioners or the Minister as the case may be, and the assistance given by these authorities is such that the problem of scheme-making is largely taken out of the practitioner's hands; the forthcoming legislation, while it is expected to sweep away the existing statutes which give jurisdiction to the Commissioners and the Minister and replace them with a single Act, will certainly not detract from their powers, and the chapters in question will continue to provide useful guidance as to the practice followed. *Sheridan and Delany* is and will remain a valuable book in any law library.

S. G. M.

The Law of Real Property. Second Edition. By R. E. Megarry, Q.C., M.A., LL.B., of Lincoln's Inn, Reader in Equity in the Inns of Court, and H. W. R. Wade, M.A., of Lincoln's Inn, Barrister-at-Law, Fellow of Trinity College, Cambridge. London: Stevens & Sons, Ltd. lxxxviii, 1077 and (index) 35 pp. (£3 10s.)

This review must start with a confession of undue caution. In welcoming the first edition (*ante*, Vol. 22, at p. 78) this reviewer (in common with some others) suggested that *Megarry and Wade* might be "indigestible as his only diet" for the student new to the subject. However, many students have made it their principal textbook without mishap, so that the reservation in recommendation must be pleasurably withdrawn.

The changes in the present edition are all primarily concerned with the presentation of the law. Apart from giving increased prominence to licences (which have been moved from the chapter on incorporeal hereditaments to that of covenants) the authors have concentrated on rewriting. Thus a good deal of material has been moved from footnotes to text, and many passages have been rewritten. The authors say (preface, p. v) that it is not easy to find two or three consecutive pages that have remained unchanged. This claim has been checked to a limited extent and found correct. For example, in the section on Rules against Remoteness, the details of *Re Gaite's Will Trusts* [1949] 1 All E.R. 459, have been moved from a footnote to the text (p. 225); the paragraph on alternative contingencies now forms part of the primary discussion, coming before instead of after the paragraphs on class gifts, determinable and conditional interests and contingent remainders (pp. 236–237); the discussion on the possibility of reverter has been revised and promoted to the text (pp. 243–244); the introductory passage on powers of appointment has been revised (pp. 248–251); and (pp. 259–260) a valuable summary of the proposals of the Law Reform Committee has been added. Similar careful revision is evident wherever the book is opened and checked with the first edition—thus *Weston* v. *Henshaw* [1950] Ch. 510 now appears as an illustration in the text at p. 308; at p. 920 a sentence has been added on the difficulty of defining a "mortgage not protected by a deposit of documents" for the purposes of the Land Charges Act, 1925, and there is even a new quotation at p. 929.

All this careful and detailed revision has increased the book's utility and readability. A second edition cannot, of course, have the impact of a first, but one may say that this edition materially enhances and consolidates the reputation so quickly won by its predecessor. One wonders how we managed without it.

F. R. C.

Concise Land Registration Practice. By Theodore B. F. Ruoff, Senior Registrar, H.M. Land Registry, Solicitor. Sweet & Maxwell, Ltd. xvi, 265 and (index) 36 pp. £1 17s. 6d.)

This reviewer had occasion, a year ago, to welcome Curtis and Ruoff's major work on *Registered Conveyancing.* Mr. Theodore Ruoff's *Concise Land Registration Practice* is set in a minor key, but must be greeted with equal enthusiasm as an important contribution, in its own right, to the conveyancer's library.

Mr. Ruoff is well known to readers of *The Conveyancer,* as both an exponent of and an advocate for the land registration system. In this volume, elucidation is seldom accompanied by indoctrination, and the author is content to expound the system on its merits, although there is a pointed discrimination (on p. 2) between "the inconclusive, expensive and repeated examination of title by *private individuals*" (reviewer's italics) and "one final and absolutely authoritative examination by the registry's *conveyancing experts*," and one feels also that Mr. Ruoff flies to hyperbole in dignifying the register of title as "completely private" on p. 3, when neither here, nor in the index under "Privacy," is there any reference to the exceptions to this privacy set out on pp. 84–85.

After this introductory propaganda, however, Mr. Ruoff displays his powers of exposition with remarkable clarity and conciseness. The longest chapter, with twenty-four pages, comprehends "Settled, Charity and Trust Property"! Chapters, each of twenty-two pages or less, contain all the information commonly needed on the subjects of First Registrations, Transfers, Charges, Leases and "Notices, Cautions, Restrictions and Inhibitions." This stringent compression is achieved with no loss of intelligibility and no skimping of relevant detail. The minor interests index, advowsons, embankments, foreign states and similar arcana are left decently interred (but with appropriate page references) in *Curtis and Ruoff.* There are, happily, no footnotes. The text contains nine tables, dealing clearly and succinctly with varied topics—among these are summaries of the evidence required on a first registration and of the action taken in the registry in relation to numerous classes of estate owner; a most useful account of the steps to be taken by the vendor's and purchaser's solicitors throughout a transfer on sale; and the action needed on the grant of various types of lease of registered land. The appendices contain specimen registers of title for freehold and leasehold land and for a rentcharge, a brief résumé of the reported cases on land registration, and the Land Registration Fee Orders and Solicitors' Remuneration (Registered Land) Orders.

One or two minor errors may be noted for correction in the inevitable future editions: a misprint "transferor" for "transferee" on p. 197 (last paragraph); an inconsistency whether the death of a joint proprietor must be proved by production of a death certificate (p. 161) or whether a grant of representation will suffice (pp. 160 and 175); and an inconsistency as to whether the survey charge in a non-compulsory area is £9 9s. (p. 14) or a minimum of £9 9s. (p. 61). The reviewer notes with regret inflationary trends in the Land Registry: when *Curtis and Ruoff* went to press in September, 1958, the minimum charge was £8.

This book must be unreservedly recommended to every conveyancer. All the aspects of law and practice relating to land registration which regularly

require consideration will be readily found in its readable and lucid pages. The book is well produced and easy to handle. *Curtis and Ruoff* will still be the last word on registered conveyancing, but it could never, without a vivid imagination, be described as a handy deskside book for ready reference. *Concise Land Registration Practice* is just this. The student will find that it justifies the author's tentatively offered sub-title of "Registered Conveyancing without Tears," and solicitors and conveyancing clerks will want to keep their copies within easy reach.

R. G. R.

We have also received:

Income Tax Law and Practice. 28th ed. 1958. (30s.) Supplement to September 1, 1959. By Cecil A. Newport, f.a., c.c.a., Fellow the Institute of Taxation, and H. G. S. Plunkett, Barrister-at-Law, formerly one of H.M. Inspectors of Taxes. London: Sweet & Maxwell, Ltd. (5s.)

Williams on Title. 2nd ed. 1957. (£4 15s.) Supplement to August 1, 1959. By W. J. Williams, b.a., Barrister-at-Law. Butterworth & Co. (Publishers) Ltd. xii and 29 pp. (7s. 6d.)

Covenants, Settlements and Taxation. 2nd ed. By G. B. Graham, Barrister-at-Law. The Solicitors' Law Stationery Society, Ltd. 71 pp. (10s. 6d. net.)—It is hardly necessary to do more than welcome the second edition of this little book. It covers a popular and important tax saving subject in small compass and supplies thirteen precedents. The *Oyez Practice Notes* vary considerably in quality but the tares are soon weeded out. Only the wheat makes a second edition. A good half guinea's worth!

Hill & Redman's Law of Landlord and Tenant. 12th ed. Third Cumulative Supplement. By W. J. Williams, b.a., Barrister-at-Law, and Miss M. M. Wells, m.a., Barrister-at-Law. Butterworth & Co. (Publishers), Ltd. (£1 2s. 6d.)

The Sanctity of Contracts in English Law. By Sir David Hughes Parry, q.c., m.a., ll.d., d.c.l. Stevens & Sons, Ltd. 77 pp. (12s. 6d.)—This short book consists of the tenth series of Hamlyn Lectures delivered by the author at Exeter University this year. The terms of the Hamlyn Trust, administered under a scheme approved by the Chancery Division, have a certain smugness about them: "... to the intent that the Common People of the United Kingdom may realise the privileges which in law and custom they enjoy in comparison with other European Peoples. ..." This smugness is bound to have an effect on the nature of the lectures, for the lecturer can hardly severely criticise his chosen subject. Lectures to non-lawyers can, however, serve a very useful purpose, as witness Holmes's *The Common Law.*

Applications under Section 17 of the Married Women's Property Act, 1882. By J. H. Hames, m.a., ll.b., Barrister-at-Law. *Oyez Practice Notes, No. 42.* The Solicitors' Law Stationery Society, Ltd. 52 pp. (8s. 6d.)—This booklet is an efficient and lucid summary of section 17 of the 1882 Act as amended by the Matrimonial Causes (Property and Maintenance) Act, 1958, s. 7. There is a useful collection of precedents.